DOCKET

No. 08-604
Title: Union Pacific Railroad Company, Petitioner
v.
Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region
Docketed: November 5, 2008
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (06-2542)
Decision Date: April 9, 2008
Rehearing Denied: August 11, 2008
Questions Presented

Date	Proceedings and Orders
Nov 5 2008	Petition for a writ of certiorari filed. (Response due December 5, 2008)
Nov 20 2008	Order extending time to file response to petition to and including January 5, 2009.
Nov 20 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Dec 5 2008	Motion for leave to file amici brief filed by National Railway Labor Conference, et al.
Jan 5 2009	Brief of respondent Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region in opposition filed.
Jan 16 2009	Reply of petitioner Union Pacific Railroad Company filed. (Distributed)
Jan 21 2009	DISTRIBUTED for Conference of February 20, 2009.
Feb 23 2009	Motion for leave to file amici brief filed by National Railway Labor Conference, et al. GRANTED.
Feb 23 2009	Petition GRANTED.
Mar 17 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 11, 2009.
Apr 29 2009	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including May 26, 2009.
May 22 2009	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for petitioner Union Pacific Railroad Co..
May 26 2009	Joint appendix filed. Statement of costs received.
May 26 2009	Brief of petitioner Union Pacific Railroad Company filed.
Jun 2 2009	Brief amici curiae of National Railway Labor Conference, et al. filed.
Jun 9 2009	The time within which to file respondent's brief on the merits is extended to and including July 27, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Wednesday, October 7, 2009.
Jul 17 2009	CIRCULATED.
Jul 20 2009	The time within which to file respondent's brief on the merits has been further extended to and including August 10, 2009.
Jul 28 2009	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Jul 29 2009	Record received from U.S.C.A. for 7th Circuit.
Aug 10 2009	Brief of respondent Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region filed. (Distributed)

Aug 14 2009	Brief amicus curiae of Brotherhood of Locomotive Engineers and Trainmen, National Division filed. (Distributed)
Sep 3 2009	Reply of petitioner Union Pacific Railroad Company filed. (Distributed)
Sep 29 2009	Record received from U.S.D.C. for the Northern District of Illinois.
Oct 7 2009	Argued. For petitioner: J. Scott Ballenger, Washington, D.C. For respondent: Thomas H. Geoghegan, Chicago, Ill.

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PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

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No. 1

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In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board ("the Board"). The statute provides that the Board's judgment "shall be conclusive . . . except . . . for": (1) "failure . . . to comply" with the Act, (2) "failure . . . to conform or confine" its order "to matters within . . . the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153 First (q). This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a "conference" between the parties. 45 U.S.C. §152 Second. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule." The questions presented are:

1. Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process.

2. Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Union Pacific Railroad Company, Petitioner, was formerly known as the Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6 percent of Union Pacific Railroad Company's stock and also wholly owns the Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and Union Pacific Railroad Company has issued publicly traded debt securities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 11

I. THE SEVENTH CIRCUIT'S DECISION PERPETUATES A WELL-ENTRENCHED SPLIT IN THE CIRCUITS CONCERNING THE AVAILABILITY OF A FOURTH EXTRA-STATUTORY DUE PROCESS GROUND FOR REVIEW OF BOARD AWARDS 15

- A. Five Circuits Have Squarely Held That Courts Must Adjudicate Due Process Challenges 15
- B. Four Circuits Have Squarely Held That The RLA Forecloses Review Of Alleged Due Process Violations 21

TABLE OF CONTENTS—Continued

Page

II. THE SEVENTH CIRCUIT'S DUE PROCESS HOLDING CONTRAVENES THIS COURT'S PRECEDENT AND EXCEEDS THE SCOPE OF ANY EXTRA-STATUTORY DUE PROCESS EXCEPTION 24

III. THE SEVENTH CIRCUIT'S DECISION RAISES ISSUES OF NATIONAL IMPORTANCE 29

CONCLUSION 31

APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Seventh Circuit, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, 522 F.3d 746 (7th Cir. Apr. 9, 2008) 1a

Opinion of the United States District Court for the Northern District of Illinois, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, 432 F. Supp. 2d 768 (N.D. Ill. May 15, 2006) 24a

APPENDIX TABLE OF CONTENTS—Continued

Page

Order of the United States Court of Appeals for the Seventh Circuit Denying Petition for Rehearing or Rehearing En Banc, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, 537 F.3d 789 (7th Cir. Aug. 11, 2008) 43a

U.S. Constitution amendment V 47a

45 U.S.C. §151a 48a

45 U.S.C. §152 Second 49a

45 U.S.C. §153 First (a), (h), (i), (j), (*l*), (m), (q), Second 50a

29 C.F.R. §301.1(b) 58a

29 C.F.R. §301.2(a) 59a

29 C.F.R. §301.3 .... 60a

29 C.F.R. §301.4 .... 61a

29 C.F.R. §301.5(d), (e) 62a

29 C.F.R. §301.7 .... 63a

29 C.F.R. §301.8 .... 64a

APPENDIX TABLE OF CONTENTS—Continued

Page

Awards of the National Railroad Adjustment Board (Mar. 15, 2005)

Award No. 26089 (SA14-19) 65a

Award No. 26090 (SA22-27) 73a

Award No. 26092 (SA35-40) 81a

Award No. 26093 (SA43-48) 89a

Award No. 26094 (SA51-56) 97a

Labor Members' Dissent to Awards Nos. 26089, 26090, 26092, 26093 & 26094 .... 105a

TABLE OF AUTHORITIES

Page(s)

CASES

Armstrong Lodge No. 762 v. Union Pacific Railroad Co.,
783 F.2d 131 (8th Cir. 1986) 20

Atchison, Topeka & Santa Fe Railroad Co. v. United Transportation Union,
175 F.3d 355 (5th Cir. 1999) 19

Atchison, Topeka & Santa Fe Railway Co. v. Buell,
480 U.S. 557 (1987) 29

Bates v. Baltimore & Ohio Railroad Co.,
9 F.3d 29 (7th Cir. 1993) 15

Brotherhood of Locomotive Engineers International Union v. Union Pacific Railroad Co.,
134 F.3d 1325 (8th Cir. 1998) 4

Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,
373 U.S. 33 (1963) 3

Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co.,
757 F.2d 656 (5th Cir. 1985) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County Railroad/M.P.S. Associates, Inc., 794 F.2d 816 (2d Cir.), *vacated in part on other grounds*, 806 F.2d 14 (2d Cir. 1986) 17, 18

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) 14

Cole v. Erie Lackawanna Railway Co., 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) 4

Creasey v. Metro-North Commuter, 269 Fed. Appx. 75 (2d Cir. 2008) 18

Del Casal v. Eastern Airlines, Inc., 634 F.2d 295 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981) 19

Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir. 1989) 12, 16, 20, 21

Employees Protective Association v. Norfolk & Western Railway Co., 511 F.2d 1040 (4th Cir. 1975) 4

English v. Burlington Northern Railroad Co, 18 F.3d 741 (9th Cir. 1994) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Gleason v. Secretary of Health & Human Services,
777 F.2d 1324 (8th Cir. 1985) 27

Goff v. Dakota, Minnesota & Eastern Railroad Corp.,
276 F.3d 992 (8th Cir. 2002) 20

Golden Rainbow Freedom Fund v. Ashcroft,
24 Fed. Appx. 698 (9th Cir. 2001) 28

Green Tree Financial Corp. v. Bazzle,
539 U.S. 444 (2003) 14

Gunther v. San Diego & Arizona Eastern Railway Co.,
382 U.S. 257 (1965) 4, 5, 29

Hall Street Associates, L.L.C. v. Mattel, Inc.,
128 S. Ct. 1396 (2008) 14, 22

Harper v. Virginia Department of Taxation,
509 U.S. 86 (1993) 26

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 4, 29

Hayes v. Western Weighing & Inspection Bureau,
838 F.2d 1434 (5th Cir. 1988) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Henry v. Delta Air Lines,
759 F.2d 870 (11th Cir. 1985) 19, 24

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 14

International Association of Mackinists & Aerospace Workers v. Metro-North Commuter Railroad,
24 F.3d 369 (2d Cir. 1994) 18

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 26

Jones v. Seaboard System Railroad,
783 F.2d 639 (6th Cir. 1986) 23

Jones v. St. Louis-San Francisco Railway Co.,
728 F.2d 257 (6th Cir. 1984) 23

Kinross v. Utah Railway Co.,
362 F.3d 658 (10th Cir. 2004) 12, 23, 24

Kuball v. Trans World Airlines, Inc.,
No. 91-56230, 1994 U.S. App. LEXIS 18678 (9th Cir. July 13, 1994) 21

Lebron v. National Railroad Passenger Corp.,
513 U.S. 374 (1995) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001) 14

Microcomputer Technology Institute v. Riley, 139 F.3d 1044 (5th Cir. 1988) 28

Minnesota Licensed Practical Nurses Association v. NLRB, 406 F.3d 1020 (8th Cir. 2005) 28

Mitchell v. Continental Airlines, Inc., 481 F.3d 225 (5th Cir.), *cert. denied*, 128 S. Ct. 136 (2007) 13, 19

Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th Cir. 1987) 16

NLRB v. Bell Aerospace Co. Division of Textron, Inc., 416 U.S. 267 (1974) 25

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) 25

NLRB v. Niagara Machine & Tool Works, 746 F.2d 143 (2d Cir. 1984) 28

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 25

TABLE OF AUTHORITIES—Continued

Page(s)

PacifiCare Health System, Inc. v. Book,
538 U.S. 401 (2003) 14

Parsons v. Continental Airlines, Inc.,
215 Fed. Appx. 799 (11th Cir. 2007) 24

Pokuta v. Trans World Airlines, Inc.,
191 F.3d 834 (7th Cir. 1999) 15

Preston v. Ferrer,
128 S. Ct. 978 (2008) 14

Radin v. United States,
699 F.2d 681 (4th Cir. 1983) 21

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 26

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 13, 25

Shafii v. British Airways,
872 F. Supp. 1178 (E.D.N.Y.), *aff'd*, 71 F.3d 404 (2d Cir. 1995), *cert. denied*, 517 U.S. 1161 (1996) 18

Shafii v. PLC British Airways,
22 F.3d 59 (2d Cir. 1994) 12, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Steffens v. Brotherhood of Railway, Airline & Steamship Clerks,
797 F.2d 442 (7th Cir. 1986) 15

Steward v. Mann,
351 F.3d 1338 (11th Cir. 2003) 24

Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks,
281 U.S. 548 (1930) 2

Texas Municipal Power Agency v. EPA,
89 F.3d 858 (D.C. Cir. 1996) 27

Union Pacific Railroad Co. v. Price,
360 U.S. 601 (1959) 29

Union Pacific Railroad Co. v. Sheehan,
439 U.S. 89 (1978) .... *passim*

United Food & Commercial Workers International Union, AFL-CIO, Local No. 150-A v. NLRB,
1 F.3d 24 (D.C. Cir. 1993) 26

United Steelworkers of America v. Union Railroad Co.,
648 F.2d 905 (3d Cir. 1981) 22, 23

TABLE OF AUTHORITIES—Continued

Page(s)

United Transportation Union v. Union Pacific Railroad Co.,
116 F.3d 430 (9th Cir. 1997) 21

STATUTES AND REGULATIONS

28 U.S.C. §1254(1) 1

45 U.S.C. §§151 *et seq* ....i, 1, 2

45 U.S.C. §151a(4) 2
45 U.S.C. §151a(5) 2

45 U.S.C. §152 Second 3, 6

45 U.S.C. §153 First (a) 4
45 U.S.C. §153 First (h) 5
45 U.S.C. §153 First (i) 3, 4, 5
45 U.S.C. §153 First (j) 5
45 U.S.C. §153 First (q) ....i, 2, 4, 6, 12
45 U.S.C. §153 First (*l*) 5
45 U.S.C. §153 First (m) 5

45 U.S.C. §153 Second ....i, 4

29 C.F.R. §301.1(b) 3

29 C.F.R. §301.2(a) 3, 4, 5

29 C.F.R. §301.3 5

Page(s)

29 C.F.R. §301.4 5

29 C.F.R. §301.5(d) 5
29 C.F.R. §301.5(e) 5

29 C.F.R. §301.7 5
29 C.F.R. §301.7(b) 5

29 C.F.R. §301.8 5

LEGISLATIVE MATERIALS

Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare, 89th Cong. (1966) 30

Pub. L. No. 73-442, 48 Stat. 1185 (1934) 4

OTHER AUTHORITY

Buck S. Beltzer & Stephen A. Wichern, *Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?*, 33 Transp. L.J. 197 (2006) 12

Page(s)

Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055 (1997)..........28

2 Richard J. Pierce, *Administrative Law Treatise* §13.2 (4th ed. 2004)..........26

Christopher L. Sagers, *Due Process Review Under the Railway Labor Act*, 94 Mich. L. Rev. 466 (1995)..........12

OPINIONS BELOW

The denial of the petition for rehearing or rehearing en banc and the concurring opinion (Pet.App.43a-46a) are reported at 537 F.3d 789. The opinion of the Seventh Circuit (Pet.App.1a-23a) is reported at 522 F.3d 746. The opinion of the United States District Court for the Northern District of Illinois (Pet.App.24a-42a) is reported at 432 F. Supp. 2d 768. Copies of the relevant Awards of the National Railroad Adjustment Board are attached at Pet.App.65a-107a.

JURISDICTION

The Seventh Circuit denied rehearing on August 11, 2008. Pet.App.43a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet.App.47a-64a) reproduces the text of the Fifth Amendment to the United States Constitution, relevant provisions from the Railway Labor Act, codified at 45 U.S.C. §§151 *et seq.*, as amended, and corresponding regulations.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to resolve a pure question of law that has divided the Circuits for nearly three decades but has never been squarely presented: whether courts are authorized to set aside Board awards based upon alleged violations of due process that do not fall within the express statutory grounds for relief. The RLA specifically delineates three, and only three, "except[ions]" to

Congress' command that Board decisions "shall be conclusive." 45 U.S.C. §153 First (q). "Due process" is not one of them. Congress instead designated the standards it deemed sufficient to protect fundamental fairness while promoting finality, and this Court made clear in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), that the statutory exceptions provide the exclusive bases for setting aside a Board award. Nevertheless, the Seventh Circuit and four other Circuits have created, reviewed, and, in the case below, set aside Board awards under a fourth, judicially-created exception for alleged due process violations. Four other Circuits have held that the statute means what it says and have refused to review due process challenges to Board awards. This Court's intervention is needed to resolve this well-entrenched conflict, to ensure that Board decisions are given the same degree of finality regardless of where the reviewing court is located, to reaffirm the limited role of the judiciary in the context of binding arbitration, and to cabin a runaway "due process" exception that is easy to manipulate and that threatens to strip Board awards of the finality Congress intended.

Statutory Background

The Railway Labor Act ("RLA" or "the Act"), codified at 45 U.S.C. §§151 *et seq.*, is a detailed statutory scheme designed to handle labor disputes arising in the railroad and airline industries. The Act's primary purpose was to provide for "the prompt and orderly settlement" of disputes in order to "'prevent strikes'" and "safeguard the vital interests of the country" in uninterrupted rail service. 45 U.S.C. §151a(4), (5); *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (citation omitted); *see also Sheehan,* 439 U.S. at 94 ("Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements "). To accomplish this purpose, the RLA established a "mandatory, exclusive, and comprehensive system for resolving grievance disputes" between railroads and their employees. *Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963).

1. The grievance procedure arising out of disciplinary charges begins with a series of investigations and hearings that take place on the railroad property as set forth in the parties' collective bargaining agreement ("CBA") and in accord with the Act. *See* 45 U.S.C. §153 First (i) (providing for disputes to be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes"); *see also* 29 C.F.R. §301.2(a).

If one of the parties is dissatisfied with the outcome, the dispute must be submitted to a "conference." *See* 45 U.S.C. §152 Second ("All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."); *see also* 29 C.F.R. §301.1(b). The investigations, hearing, and conferences are collectively referred to as "on-property" proceedings.

2. If the dispute cannot be resolved in conference, the parties may initiate arbitration proceedings before the National Railroad Adjustment Board ("NRAB" or "the Board").[1] 45 U.S.C. §153 First (i); 29 C.F.R. §301.2(a). The Board is a product of the 1934 amendments to the Act, Pub. L. No. 73-442, 48 Stat. 1185, 1186 (1934), and was created to handle so-called "minor" disputes that "'grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions'" and "involve 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994) (citations omitted). In contrast, "[m]ajor" disputes "relate to 'the formation of collective [bargaining] agreements or efforts to secure them.'" *Id.* at 252.

The NRAB serves as an "expert body" "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965). This is because its membership—consisting of an equal number of labor and management representatives, 45 U.S.C. §153 First (a)—"is in daily contact with workers and employers, and knows the industry's language, customs, and practices." *Gunther*, 382 U.S. at 261. The Board is split among four divisions, with each having jurisdiction over different classes of employees. 45 U.S.C. §153 First (h); 29 C.F.R. §§301.3-.4.

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[1] The RLA also permits parties to refer disputes to one of two other types of arbitral bodies as an alternative to the NRAB: "public law boards" and "special boards of adjustment." 45 U.S.C. §153 Second; *Bhd. of Locomotive Eng'rs Int'l Union v. Union Pac. R.R. Co.*, 134 F.3d 1325, 1332 n.4 (8th Cir. 1998). The scope of judicial review for these alternative boards is the same as that for the NRAB under 45 U.S.C. §153 First (q). *See, e.g., Cole v. Erie Lackawanna Ry. Co.*, 541 F.2d 528, 531-32 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Employees Protective Ass'n v. Norfolk & W. Ry. Co.*, 511 F.2d 1040, 1045 (4th Cir. 1975).

Although the NRAB is an arbitral body, Congress set forth detailed procedural requirements to ensure fairness to all litigants. The RLA requires the Board to provide "due notice of all hearings," an opportunity for the parties to "be heard ... in person," and the option to be represented "by counsel, or by other representatives, as they may respectively elect." 45 U.S.C. §153 First (j); 29 C.F.R. §§301.7-.8. Litigants are required to set forth, in written form, "all relevant argumentative facts, including all documentary evidence submitted in exhibit form" and to submit "a full statement of all facts and all supporting data bearing upon the disputes." 45 U.S.C. §153 First (i); 29 C.F.R. §§301.2(a), 301.5(d)-(e); 29 C.F.R. §301.7(b). This evidence is commonly referred to as the "on-property record." After reviewing the record before it and hearing argument, the Board makes an award "in writing" and "furnishe[s it] to the respective parties of the controversy." *Id.* §153 First (m). In the event the Board is deadlocked, a neutral "referee" is appointed to break the tie. *Id.* §153 First (*l*).

3. If the aggrieved party is dissatisfied with the award, judicial review is available, but only under extremely limited circumstances. The Act unequivocally states that "the findings and order of the division shall be conclusive on the parties, *except* that the order of the division may be set aside, in whole or in part, or remanded to the division" for only three specific reasons: (1) "failure of the division to comply

with the requirements of this chapter," (2) "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction," or (3) "fraud or corruption by a member of the division making the order." 45 U.S.C. §153 First (q). The RLA's "scope of judicial review of Adjustment Board decisions is 'among the narrowest known to the law'" in furtherance of Congress' intent to keep "so-called 'minor' disputes within the Adjustment Board and out of the courts." *Sheehan*, 439 U.S. at 91, 94 (citations omitted).

Proceedings Below

1. Union Pacific Railroad Company ("Union Pacific" or "the Carrier") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "the Organization") are parties to several agreements covering Union Pacific employees. Pet.App.28a. In 2002 and 2003, Union Pacific charged five employees with disciplinary violations after a formal investigation and hearing. Pet.App.28a-29a; SA4 ¶11. BLET filed claims with Union Pacific challenging each decision as violating one of the CBAs. Pet.App.3a. [2]

Dissatisfied with the result, BLET filed a Notice of Intent to arbitrate before the Board. Pet.App.29a. The Organization, however, failed to include evidence in the on-property record that any of the cases had been conferenced as required by the Act, 45 U.S.C. §152 Second. Pet.App.68a, 76a, 84a, 92a, 100a. In the arbitration proceedings, Union Pacific raised this as an issue precluding the Board's exercise of jurisdiction over the cases. Pet.App.66a, 74a, 82a, 90a, 98a. BLET offered to submit new evidence to demonstrate that the conferencing requirement had been satisfied, Pet.App.67a-68a, 75a-76a, 83a-84a, 91a-92a, 99a-100a, but the Board (or, more accurately, the neutral referee) ultimately refused to consider this evidence. Pet.App.69a, 77a, 85a, 93a, 101a. Citing extensive Board precedent on this issue, the referee found that BLET's failure to include evidence of conferencing in the on-property record required dismissal and, on March 15, 2005, the Division issued five arbitration awards in favor of Union Pacific: Award Nos. 26089, 26090, 26092, 26093, and 26094 (hereinafter "Awards"). Pet.App.65a-107a.

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[2] "SA" refers to the Supplemental Appendix of Defendant-Appellee filed with the Seventh Circuit.

In all relevant parts, the Awards are identical and conclude that based on "the weight of Board precedent upholding the Carrier's position," "the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied" and, accordingly, "[t]he Board is . . . without jurisdiction to consider this dispute." Pet.App.68a, 76a, 84a, 92a, 100a. The Board went on to explain that it could not consider the Organization's belated submissions because "all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside." The Board thus "stress[ed]" that "the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal." Pet.App.69a, 77a, 85a, 93a, 101a.

2. BLET filed a Petition for Review to the United States District Court for the Northern District of Illinois. In its Petition, the Organization asked the

district court to set aside the NRAB awards arguing that: (1) conferencing is not required by the RLA; (2) the Board had improperly limited its jurisdiction by refusing to consider the merits of its claims; and (3) the Board's decision not to consider its untimely evidence of conferencing amounted to a violation of due process. Pet.App.30a-31a. The district court dismissed the Petition on a Rule 12(b)(6) motion after considering and rejecting each challenge. Pet.App.42a.

As relevant here, the district court explained that, in addition to the three specific statutory grounds for review, "[i]n this circuit, an award also may be vacated if the NRAB denied a party due process." Pet.App.30a. BLET had argued that the procedural rule adopted by the Board—requiring evidence of conferencing to be included in the on-property record—was "new" and could not be applied in this case without violating due process. Pet.App.38a. The district court disagreed. After reviewing the arbitral decisions relied on by the Board, the court found that "[u]nder its limited scope of review, [it could not] find that the NRAB proceedings were fundamentally unfair when the Organization had the ability to submit evidence of conferencing, Board precedent made it clear that it considered conferencing a jurisdictional requirement and Board precedent indicated that the record should contain evidence of such conferencing." Pet.App.40a-41a. Accordingly, the court affirmed the awards.

3. BLET appealed to the Seventh Circuit. The Organization abandoned its claim that conferencing was not required by the Act and argued only that the Board denied it due process and failed to act within the scope of its jurisdiction by requiring proof of conferencing in the on-property record. Pet.App.7a-8a.

At the outset, the Seventh Circuit rejected Union Pacific's attempt "to cast doubt on the law of this circuit that allows judicial review of Board orders where a party asserts a due process violation." Pet.App.8a. Finding that judicial review of constitutional questions cannot be foreclosed without "clear and convincing evidence" from Congress, and deeming the RLA to fall short of that standard, the Seventh Circuit "decline[d] to depart from [its] prior holdings on this issue." Pet.App.8a-9a. In doing so, the court recognized that *Sheehan* "created confusion in some circuits as to the validity of due process review of NRAB decisions," but sided with the Courts of Appeals that had concluded *Sheehan* did not preclude such review. Pet.App.9a.

Turning to the merits of the due process challenge, the Seventh Circuit focused the inquiry on whether or not the Board's requirement of including evidence of conferencing in the on-property record was a "new rule, unknown to the Organization." Pet.App.10a. Rejecting Union Pacific's argument that no case law supported the notion "that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule," Brief of Defendant-Appellee ("Def.-Appellee Br.") at 26, the Seventh Circuit concluded that "a tribunal may not alter, without warning, the rules for access to it." Pet.App.9a. Thus, according to the court, "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. The court then reviewed the arbitral decisions of the Board, the RLA, and the regulations (known as "Circular One"), and found nothing clearly requiring evidence of conferencing to be included in the on-property record.

Pet.App.12a-22a. Accordingly, the Seventh Circuit held that the Board denied BLET due process in refusing to review its late submission and reversed the district court.[3] Pet.App.22a-23a.

4. The Seventh Circuit denied Union Pacific's petition for rehearing or rehearing en banc on August 11, 2008. Pet.App.43a. Chief Judge Easterbrook and Circuit Judge Posner joined in the denial, but wrote a separate concurrence. Recognizing the 4-5 split among the Circuits on the question of whether there is a separate exception permitting extra-statutory due process review, they ultimately found "little to be gained from making the conflict 5-4 one way rather than 5-4 the other way." Pet.App.44a. In the end, "[o]nly Congress or the Supreme Court can bring harmony." *Id.*

The concurrence also questioned the assumption underlying the panel's due process holding: "that, if the Board adopted this requirement in the course of decision—that is, by adjudication rather than prospective rulemaking—then it violated the Constitution." Pet.App.45a. To the contrary, "[l]awmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the parties but also to all similar cases." *Id.* This is true of administrative agencies as well, and applies regardless of whether the "new" rule is substantive or procedural in nature. *Id.*[4]

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[3] The Seventh Circuit also strangely found "no question that the parties had met in conference and therefore the presentation of new evidence in no way prejudiced the Carrier." Pet.App.21a. In fact, the case was before the district court on a Rule 12(b)(6) motion to dismiss and whether or not there had been a conference in each case is very much in dispute. Rehearing Pet. at 7.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to resolve a well-recognized, entrenched conflict among the Courts of Appeals, reaffirm the limited role of the judiciary in the context of binding arbitration, and cabin a runaway "due process" exception that threatens to strip NRAB awards of the finality Congress intended. The Seventh Circuit, along with the Second, Fifth, Eighth, and Ninth Circuits, have repeatedly held that litigants are not limited to the grounds for judicial review set forth in the RLA and are permitted to secure relief based upon any alleged violation of due process. The Third, Sixth, Tenth, and Eleventh Circuits have held that the statutory grounds are exclusive and have dismissed complaints alleging due process violations no different than the one at issue here. This conflict is well-recognized by courts and commentators alike and is long overdue for this Court's review.[5]

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[4] Judge Easterbrook went on to suggest that "all parties to this case assumed that a change of law during the course of administrative adjudication offends the Constitution." Pet.App.46a. He was mistaken. Union Pacific argued in its brief below that: "BLET is unable to point to a single case holding that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule, so long as both sides are in fact allowed to make their case on the disputed evidentiary point." Def.-Appellee Br. at 26. Moreover, the Seventh Circuit actually ruled on the issue: "When a Board creates a new requirement on its own, it is not interpreting a CBA or following the dictates of the RLA or its regulations. . . . [S]uch changes in the rules violate the due process rights of the parties." Pet.App.22a; *see Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'") (citations omitted).

The confusion among the circuits stems largely from this Court's 1978 decision in *Sheehan*. In that case, the Tenth Circuit had asserted jurisdiction to review "purely legal issues" that arose from Board decisions. 439 U.S. at 91-92 (emphasis omitted). This Court reversed the Tenth Circuit's holding that the Board's refusal to address the merits of plaintiff's equitable tolling claim violated due process. It held that if the Tenth Circuit believed that the Board had not considered the equitable tolling argument, it "was simply mistaken." *Id.* at 92. If, on the other hand, the court had intended to "reverse the Adjustment Board's rejection" of that argument, it had "exceeded the scope of its jurisdiction." *Id.* at 92-93.

This Court went on to explain that "[j]udicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Id.* at 93 (citing 45 U.S.C. §153 First (q)). The Court reasoned that "[o]nly upon one or more of *these bases* may a court set aside an order of the Adjustment Board" and

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[5] *See, e.g., Kinross v. Utah Ry. Co.*, 362 F.3d 658, 661-62 (10th Cir. 2004); *Shafii v. PLC British Airways*, 22 F.3d 59, 62-63 (2d Cir. 1994); *Edelman v. W. Airlines, Inc.*, 892 F.2d 839, 846 (9th Cir. 1989); Buck S. Beltzer & Stephen A. Wichern, *Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?*, 33 Transp. L.J. 197, 204-20 (2006); Christopher L. Sagers, Notes, *Due Process Review Under the Railway Labor Act*, 94 Mich. L. Rev. 466, 469 (1995).

"that this statutory language means just what it says" as it had "emphasized" "time and again." *Id.* at 93 (emphasis added). Some courts have found this language to be unequivocal; others have found ambiguity in the Court's holding. As Judge Easterbrook made plain: "[o]nly Congress or the Supreme Court can bring harmony . . . ." Pet.App.44a.

This case is an ideal vehicle with which to do so. Despite the long-standing nature of the split, this question has never been squarely presented to this Court.[6] There can be no doubt that Union Pacific would have prevailed if Respondent's challenge had been filed in the Third, Sixth, Tenth, or Eleventh Circuits. The Seventh Circuit held that the Board's decision violated due process—a question that would never have been considered in those courts. This is the Court's first genuine opportunity to resolve the confusion that has persisted since *Sheehan*.

The Seventh Circuit's erroneous due process holding provides an additional reason to grant review. The panel decision declared that all "new" rules adopted by the NRAB in the course of adjudication raise an issue of constitutional dimension requiring searching judicial review. This holding not only contravenes the law of this Court, *see, e.g., SEC v.*

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[6] In his denial of rehearing opinion, Judge Easterbrook suggests this Court may not be interested in bringing "harmony" given the long-standing nature of the conflict. Pet.App.44a. But, in fact, the only certiorari petitions raising this conflict were filed in the 1994 *Shafii* case (discussed *infra*) which, unlike the case at hand, did not find a constitutional violation, and the 2007 *Mitchell v. Continental Airlines, Inc.*, 481 F.3d 225 (5th Cir.), *cert. denied*, 128 S. Ct. 136 (2007), case (discussed *infra*) where the Fifth Circuit held that petitioners lacked standing.

Chenery Corp., 332 U.S. 194, 203 (1947), it also raises the specter of litigants reframing their disagreement with every arbitral outcome as a "due process" issue by simply pointing to something unique about the facts of their case rendering the NRAB ruling "new."

The outcome in this case cuts to the core of the RLA and raises an issue of national importance. Nearly half of the Circuits in the country routinely review the substance of Board awards for due process violations. In recent years—indeed, just last Term—this Court recognized the importance of congressional policies favoring arbitration and circumscribing the judiciary's limited role in resolving and reviewing such disputes.[7] This case is no different. Opening the door to judicially-created grounds for review, especially one as potentially expansive and easy to manipulate as due process (as evidenced by the Seventh Circuit's ruling), fundamentally undermines the policies underlying the RLA and creates considerable problems for the industry.

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[7] *See, e.g.*, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (Parties may not expand the scope of judicial review under the Federal Arbitration Act beyond the grounds specified in the statute.); *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (claim that party violated state statute to be decided by arbitrator, not agency); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (claim that contract containing an arbitration provision is void for illegality to be addressed by arbitrator, not court); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion of Breyer, J.) (whether agreements prohibited class arbitration was issue for arbitrator, not court); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (whether damages limitation rendered agreement unenforceable was to be addressed by arbitrator, not court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (whether statute of limitations barred arbitration to be decided by arbitrator, not court); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001) (summarily reversing set aside of arbitration award where arbitrator was construing contract and acting within scope of authority).

I. THE SEVENTH CIRCUIT'S DECISION PERPETUATES A WELL-ENTRENCHED SPLIT IN THE CIRCUITS CONCERNING THE AVAILABILITY OF A FOURTH EXTRA-STATUTORY DUE PROCESS GROUND FOR REVIEW OF BOARD AWARDS

A. Five Circuits Have Squarely Held That Courts Must Adjudicate Due Process Challenges

1. In the decision below, the Seventh Circuit refused "to depart from [its] prior holdings" declaring that courts can review Board awards on due process grounds notwithstanding the omission of due process from the three exceptions provided by statute.[8]

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[8] Prior Circuit precedent recognizing this fourth ground for review began with *Steffens v. Brotherhood of Railway, Airline & Steamship Clerks*, 797 F.2d 442 (7th Cir. 1986). *Steffens* largely relied on pre-*Sheehan* Circuit cases for this exception but, in a footnote, concluded that *Sheehan* did nothing to "disapprove of due process as a basis for review." *Id.* at 448 n.5. Rather, *Steffens* believed the Sheehan Court held only that the Board had considered the equitable tolling issue and rejected it, and that reviewing the substance of that decision would fall outside the courts' limited bases for review. *Id.* The Seventh Circuit has consistently reviewed and rejected due process claims under this judicially-created exception. *See, e.g., Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7th Cir. 1999) (recognizing that plaintiff's allegations did not fall within any of the statutory grounds for setting aside an award but nevertheless reviewing and upholding the Board decision under "a fourth category of objections that supply jurisdiction over the award—an allegation that a party was denied due process"); *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29, 31 (7th Cir. 1993) (considering and rejecting

Pet.App.9a. But the court did more than simply reaffirm prior decisions; it reassessed the contrary argument posed by Union Pacific (and adopted by other Circuit courts) and expanded on the rationale supporting its initial conclusion.

The court reasoned that judicial review of constitutional claims is presumed unless there is "clear and convincing evidence" showing Congress intended otherwise, and that "[n]othing in section 153 First (q) of the RLA manifests" such evidence. Pet.App.8a. Despite "confusion" created by *Sheehan* "in some circuits as to the validity of due process review of NRAB decisions," the court noted that several circuits, including the Seventh, had "concluded that the *Sheehan* decision does not prohibit due process review." Pet.App.9a. Accordingly, the court adhered to its prior holdings and reviewed Respondent's due process challenge on its merits.

2. Since *Sheehan* was decided three decades ago, the Second, Fifth, Eighth and Ninth Circuits have joined the Seventh in concluding that courts have implied authority to review Board awards on extra-statutory due process grounds. These courts reason that "[t]he Supreme Court has never clearly and explicitly ruled on whether there is federal jurisdiction over a constitutional challenge to a Board's proceedings," *Edelman*, 892 F.2d at 845, and thus set

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due process claim after recognizing prior Circuit case law allowing extra-statutory exception "for judicial review where the Board deprives a litigant of his or her constitutional right to due process"); *Morin v. Consol. Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (considering and rejecting due process claim after holding that "review is available if the NRAB denies a person due process in contravention of the Fifth Amendment").

out to answer the question independent of *Sheehan.* In these Circuits, the availability of a judicially-created due process ground for review is well-established—and has been reaffirmed repeatedly, as recently as this year.

Second Circuit. In *Shafii v. PLC British Airways,* the Second Circuit confronted and rejected the argument that an alleged due process violation is not a basis for vacating an arbitration award. 22 F.3d 59 (2d Cir. 1994). Noting that pre-*Sheehan* courts "historically reviewed NRAB proceedings to ensure that a participant's rights to due process were not violated" and recognizing the post-*Sheehan* circuit split, the court ultimately held that *Sheehan* did not preclude due process review. *Id.* at 62. Instead, it concluded that the *Sheehan* Court reviewed the due process claim on its merits and simply "rebuff[ed] the Tenth Circuit for its expansive ruling on their ability to review 'purely legal questions.'" *Id.* at 63-64. Because of the "'serious constitutional question of the validity of'" a statute "foreclos[ing] constitutional review," the court looked for "clear and convincing evidence" of such intent and found none in the RLA. *Id.* at 64 (citation omitted). The Second Circuit refused to "presume that Congress intended" to "leave unprotected a plaintiff's legitimate constitutional right to be treated in accord with due process before the Board," and "reaffirm[ed]" the "rule . . . that an order of the [Board] or its counterparts is reviewable upon a claim that a participant was denied due process by the Board."[9] *Id.* Finding a deprivation of due process to be a viable basis to set aside the award, the court ultimately remanded for consideration of the merits of plaintiff's claim.[10]

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[9] The court was presumably "reaffirm[ing]" the Second Circuit's decision in *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County Railroad/M.P.S.*

Since *Shafii*, the Second Circuit has reaffirmed this position. *See, e.g., Creasey v. Metro-North Commuter*, 269 Fed. Appx. 75, 77 (2d Cir. 2008) (citing *Shafii* as holding that due process provides an additional non-statutory ground for review). Indeed, in *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad*, 24 F.3d 369, 371 (2d Cir. 1994), the court adhered to the "view that due process affords a fourth ground for judicial review" and affirmed the district court's order setting aside an award as violative of due process. The sole basis was the judicially-created fourth exception—no statutory ground applied.

Fifth Circuit. In *Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co.*, the court held that, in addition to the three statutory bases to set aside a Board decision, "judicial review is required when a board denies a litigant due process and thus acts in an unconstitutional manner."[11] 757

Associates, Inc., 794 F.2d 816 (2d Cir.), *vacated in part on other grounds*, 806 F.2d 14 (2d Cir. 1986), which suggested it would permit due process challenges. 794 F.2d at 819 (noting, without discussing *Sheehan*, that had the Board reached a different outcome its "failure to comply with the basic requirements of due process" would "warrant judicial rejection of the result").

[10] On remand, the district court found no due process violation as a matter of law and granted summary judgment in favor of defendants. *Shafii v. British Airways*, 872 F. Supp. 1178, 1182-83 (E.D.N.Y.), *aff'd*, 71 F.3d 404 (2d Cir. 1995). On this record, the petition for certiorari was denied. 517 U.S. 1161 (1996).

[11] Before *St. Louis Southwestern Railway* and after *Sheehan*, the Fifth Circuit entertained and rejected a due process challenge

F.2d 656, 661 (5th Cir. 1985). For this proposition, the court relied on a pre-*Sheehan* decision. *Id.* at 661 n.25. The court ultimately concluded that the due process allegations lacked merit.

Since then, the Fifth Circuit still has not grappled with *Sheehan* but has nevertheless adhered to the view that violations of due process provide a fourth ground for review. *See Mitchell*, 481 F.3d at 231 (reiterating that Fifth Circuit recognizes "a fourth, implied ground for review: whether an award was rendered in violation of a party's due process rights"); *Atchison, Topeka & Santa Fe R.R. Co. v. United Transp. Union*, 175 F.3d 355, 357 (5th Cir. 1999) (noting that Fifth Circuit "has recognized a fourth basis for setting aside an award, in cases where the award failed to meet the requirements of due process").[12]

Eighth Circuit. In *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, the Eighth Circuit held that the district court correctly reviewed the merits of

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to a Board decision even after recognizing that the three statutory grounds for review were exclusive. *Del Casal v. E. Airlines, Inc.*, 634 F.2d 295, 298-99 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). In *St. Louis Southwestern Railway* and subsequent cases, the court explicitly acknowledged due process as a fourth ground for review.

[12] The Fifth Circuit in *Hayes v. Western Weighing & Inspection Bureau*, likewise recognized due process as a fourth ground for judicial review, citing a pre-*Sheehan* case, and in fact reviewed and rejected plaintiff's due process challenge on the merits. 838 F.2d 1434, 1436 (5th Cir. 1988). It also strangely ignored *St. Louis Southwestern Railway Co.*, and cited *Del Casal*, 634 F.2d 295, and *Henry v. Delta Air Lines*, 759 F.2d 870 (11th Cir. 1985), as having "cabined the reach of the due process challenge." 838 F.2d at 1436. Despite this confusion, the Fifth Circuit has reiterated its *St. Louis Southwestern Railway Co.* holding on several occasions in more recent years, as noted above, *supra* at 16-17.

plaintiff's due process challenge but ultimately found that the allegations did not constitute a violation. 276 F.3d 992, 998 (8th Cir. 2002). For its conclusion that "railroad arbitration decisions are reviewable for possible due process violations," *id.* at 997, the court relied on a prior Eighth Circuit decision,[13] a pre-*Sheehan* Supreme Court case, and the Second Circuit's decision in *Shafii.*

Ninth Circuit. The Ninth Circuit in *Edelman v. Western Airlines, Inc.*, asserted that it was deciding a question of first impression in the Circuit as "[t]he Supreme Court has never clearly and explicitly ruled on whether there is federal jurisdiction over a constitutional challenge to a Board's proceedings." 892 F.2d at 845. As for the Supreme Court's decision in *Sheehan* more than a decade prior, the Ninth Circuit found it unclear whether the Court "refused to review the railroad adjustment board's decision . . . because the board was interpreting the collective bargaining agreement, or whether the Court refused because due process is not one of the three explicitly enumerated grounds for judicial review." *Id.* at 846. The court decided it was the former and aligned itself with the Fifth and Seventh Circuits. Finding this result consistent with the "'well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed,'" and seeing no "clear and convincing evidence" that Congress intended otherwise, the court held that due process claims were cognizable despite the limitations of the

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[13] The case relied on was *Armstrong Lodge No. 762 v. Union Pacific Railroad Co.*, where the court cited the three statutory grounds as exclusive but nevertheless entertained a due process challenge. 783 F.2d 131, 134-35 (8th Cir. 1986).

RLA. *Id.* at 846-47 (citations omitted). In the end, the court found no violation of due process and affirmed.

Since *Edelman*, the Ninth Circuit has reiterated that due process provides a fourth ground for reviewing a Board decision. *See English v. Burlington N. R.R. Co.*, 18 F.3d 741, 744 (9th Cir. 1994) (citing *Edelman* for its authority to review a due process challenge but ultimately finding no violation); *Kuball v. Trans World Airlines, Inc.*, No. 91-56230, 1994 U.S. App. LEXIS 18678, at *2 (9th Cir. July 13, 1994) (citing *Edelman* for authority to review and reject due process challenge); *see also United Transp. Union v. Union Pac. R.R. Co.*, 116 F.3d 430, 432-33 (9th Cir. 1997) (reiterating *Edelman* holding).[14]

B. Four Circuits Have Squarely Held That The RLA Forecloses Review Of Alleged Due Process Violations

The Third, Sixth, Tenth, and Eleventh Circuits have unequivocally held that the three statutory exceptions are exclusive and that courts cannot review Board awards on independent due process grounds. These courts steadfastly follow *Sheehan* and refuse to consider the substance of extra-statutory due process challenges—regardless of their merit. The well-entrenched split continues to deepen, with the Tenth

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[14] The Fourth Circuit has yet to issue a clear holding taking a side in this conflict. Dicta in *Radin v. United States*, appears to suggest that deprivation of due process could be reviewable—although it relies on the Tenth Circuit's discredited decision in *Sheehan* and notes that the allegations also fall within one of the statutory bases for review. 699 F.2d 681, 684 (4th Cir. 1983).

Circuit joining this side of the conflict as recently as 2004.[15]

Third Circuit. In *United Steelworkers of America Local 913 v. Union Railroad Co.*, the Third Circuit held that the three statutory grounds for review are exclusive and rejected the argument that a court can also review alleged due process violations that do not otherwise fit within those categories. 648 F.2d 905, 911-12 (3d Cir. 1981). In that case, the plaintiff had conceded that *Sheehan* precluded review of procedural due process claims but argued that substantive due process review was still available. Finding "no language in *Sheehan* to justify such a procedural/substantive distinction," the Third Circuit reversed the district court's decision to set aside the Board's findings because of "the statutory command that Board findings be set aside in only three narrow sets of circumstances." *Id.* at 911, 914. It did so even though in some cases "circumstances may seem compelling." *Id.* at 914.

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[15] The split here is strikingly similar to that presented in *Hall Street Associates*, decided by this Court last Term. There, "[t]he Courts of Appeals had split over the exclusiveness of the[] statutory grounds" provided in the Federal Arbitration Act as bases "to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions." 128 S. Ct. at 1403. Although the actual holding in that case centered on whether parties could expand upon the limited statutory bases for review by private contract (they could not), the underlying question of exclusivity bears a close resemblance to the RLA split squarely presented here. This Court recognized that the statutory limitations "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1405. This Court also stated that "[a]ny other reading" would just "open[] the door" "'to a more cumbersome and time-consuming judicial review process.'" *Id.* (citation omitted). The same is true here, and the problem is equally in need of resolution by this Court.

Sixth Circuit. The Sixth Circuit in *Jones v. St. Louis-San Francisco Railway Co.*, held that judicial review of an arbitration award "is limited to only those grounds specified" by statute and that, accordingly, a due process claim "cannot serve as a basis for judicial review" under the RLA. 728 F.2d 257, 261 (6th Cir. 1984). The court relied on *Sheehan* and the Third Circuit's decision in *United Steelworkers of America*. Two years later, the Sixth Circuit reiterated this holding in *dicta*. *See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n.2 (6th Cir. 1986) (noting that district court had "correctly relied on *Sheehan* in holding that [plaintiff's] allegations of due process violations did not provide a legitimate ground for review").

Tenth Circuit. As recently as 2004, the Tenth Circuit joined the split and held that *Sheehan* "preclude[s] judicial review of due process claims beyond those specifically articulated in the Railway Labor Act." *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 (10th Cir. 2004). Recognizing the conflict among the Circuits, the court sided with the Third, Sixth, and Eleventh. *Id.* at 661-62. It reasoned that a contrary conclusion would not only "require an evasive reading of *Sheehan*, it would also frustrate Congress' intent to keep such disputes out of the courts." *Id.* at 662. Further, it concluded that the three statutory grounds themselves provided sufficient protections to satisfy constitutional due process requirements. As the Tenth Circuit explained:

> First, Congress allowed for review of the Board's failure to comply with the

> requirements of the Railway Labor Act, including procedural requirements ensuring claimants an opportunity to present evidence and argue their case. Second, it allowed for review of the Board's failure to confine itself to matters within its jurisdiction. Finally, it allowed for review for fraud or corruption on the part of the Board, which ensures an impartial tribunal.

Id. at 662 n.3. Ultimately, the court reversed the district court's due process finding as outside its jurisdiction and remanded for consideration of whether plaintiff's claims fell within one of the three statutory grounds for review.

Eleventh Circuit. In *Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985), the Eleventh Circuit held that, per *Sheehan*, "judicially created due process challenges to System Board awards" "must fail." In later cases, the court has consistently referred to the three statutory exceptions as exclusive. *See Steward v. Mann*, 351 F.3d 1338, 1344 (11th Cir. 2003) (citing *Henry* and stating that court may set aside award for "one of only three" statutory reasons); *Parsons v. Cont'l Airlines, Inc.*, 215 Fed. Appx. 799, 800-01 (11th Cir. 2007) (same).

II. THE SEVENTH CIRCUIT'S DUE PROCESS HOLDING CONTRAVENES THIS COURT'S PRECEDENT AND EXCEEDS THE SCOPE OF ANY EXTRA-STATUTORY DUE PROCESS EXCEPTION

The mischief threatened by the Seventh Circuit's extra-statutory due process exception is magnified by the substance of its due process analysis. The NRAB's decision in this case was perfectly foreseeable in light of its prior precedent and did not constitute a "new rule" at all—certainly not in any constitutionally significant sense. By confusing the ordinary retroactivity inherent in common law or agency adjudication with a due process violation, the Seventh Circuit's decision transforms what was supposed to be "among the narrowest" standards of review "known to the law" into a free pass for litigants to second-guess the agency's routine application of broad principles to particular factual circumstances, and the Board's basic authority to articulate its interpretation of the governing statutes via adjudication rather than rulemaking.

This runs counter to this Court's and other Circuits' precedents. It is well-settled that "new" rules adopted in the course of an adjudication are rarely applied *prospectively*. *See, e.g., Chenery*, 332 U.S. at 203 ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency."); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (plurality opinion of Fortas, J.) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (agency interpretation announced in adjudication "is entitled to deference even if it represents a departure from . . . prior policy"). Rather, the presumption is that such rules or interpretations apply to the parties before the court or agency, as well as to cases pending at the time of decision. *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293-94 (1974) ("The views expressed in [*Chenery*] and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding . . . ."); *see also* Pet.App.45a ("Administrative agencies no less than courts may adopt new rules by adjudication.") (Easterbrook, J., concurring).[16]

This presumption of retroactivity is especially strong when the "new" rule does not upset settled precedent but rather simply fills in interstices in the law. *United Food & Commercial Workers Int'l Union, AFL-CIO, Local No. 150-A v. NLRB*, 1 F.3d 24, 35 (D.C. Cir. 1993) ("[W]here an agency ruling seeks only to clarify the contours of established doctrine, we will almost *per force* allow its retroactive application."); *see also* 2 Richard J. Pierce, Jr., *Administrative Law Treatise* §13.2 (4th ed. 2002) ("A basic distinction must be recognized between (1) new applications of law or policy, clarifications, and additions, and (2) substitution of new law or policy for old law or policy that was reasonably clear. Only the second raises problems of fairness to those who have relied on the old law."). Even in those rare instances where prospective adjudication is *permitted*, this Court has never couched the inquiry in terms of due process nor has it declared retroactive decision-making to be an error of constitutional magnitude.

In the case at hand, no one has suggested that the Board's ruling upsets settled precedent. (To the contrary, the Board concluded and Union Pacific argued that prior precedent compelled this result, *see, e.g.*, Pet.App.3a-5a; Def.-Appellee Br. at 26-32, and the district court found it "indicated" by "Board precedent," Pet.App.40a-41a.) Even the Seventh Circuit held only that prior Board awards were "unclear" and "not conclusive," and that the statute and regulations failed to reveal such a "rule." Pet.App.16a, 18a. BLET ultimately conceded that (1) parties cannot proceed to arbitration without first meeting in conference, and (2) that "parties to arbitration must present all of their evidence to the Board in the on-property record." Pet.App.12a. That the NRAB—functioning as an appellate tribunal—would (and had) read these two rules together does not reverse any settled expectations. *Cf. Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 875-76 (D.C. Cir. 1996) (dismissing for lack of jurisdiction where litigant failed to demonstrate compliance with statutory exhaustion prerequisites); *Gleason v. Sec'y of Health & Human Servs.*, 777 F.2d 1324, 1324 (8th Cir. 1985) (dismissing appeal where there was no "clear and unambiguous statement in the record of both parties' consent to the magistrate's jurisdiction").

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[16] Indeed, in recent years, this Court has moved very close to adopting a rule of absolute retroactivity in the context of judicial adjudication. *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (plurality opinion of Souter, J.).

Yet, instead of applying the presumption of retroactivity to what it (erroneously) believed to be a new interpretation of Board rules, the Seventh Circuit turned the presumption on its head and gave it constitutional status. *See* Pet.App.11a ("[I]f the Board create[s] a new rule previously unknown and unapplied, this ... constitute[s] a violation of due process."); Pet.App.9a ("[A] tribunal may not alter, without warning, the rules for access to it."). This separates the adjudicative process of the NRAB from that of every other agency and court in this country—and does so where judicial review is supposed to be "'among the narrowest known to the law.'" *Sheehan*, 439 U.S. at 91 (citation omitted).

In the end, the Seventh Circuit's holding in this case stands alone. If Union Pacific had litigated in the Third, Sixth, Tenth, or Eleventh Circuits, it would have prevailed without any due process inquiry at all. But it would have won even if the reviewing court was one of the other four Circuits recognizing due process as a permissible ground for review. Every one of those courts engages in a balancing test to determine whether a "new" rule or interpretation should be applied retroactively and none couches the inquiry in due process terms. *See, e.g., NLRB v. Niagara Mach. & Tool Works*, 746 F.2d 143, 151 (2d Cir. 1984); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050-51 (5th Cir. 1988); *Minn. Licensed Practical Nurses Ass'n v. NLRB*, 406 F.3d 1020, 1026-27 (8th Cir. 2005); *Golden Rainbow Freedom Fund v. Ashcroft*, 24 Fed. Appx. 698, 700 (9th Cir. 2001).[17] Accordingly, whether or not the Board's decision was "new," it would not have been reviewed under the implied due process exception in those Circuits and, absent any statutory basis for review, would have been dismissed.

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[17] *See also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv. L. Rev. 1055, 1075 (1997) (noting that "[t]he Court has not identified [a] . . . due process limitation on adjudicative retroactivity" which "is not surprising, given that adjudicative retroactivity was the exclusive practice for most of the period during which due process limitations would likely have developed").

III. THE SEVENTH CIRCUIT'S DECISION RAISES ISSUES OF NATIONAL IMPORTANCE

The recognition of an additional, extra-statutory ground for review by the Seventh Circuit and nearly half of the Circuits in this country fundamentally undermines the policy underlying the RLA. And the Seventh Circuit's expansive (and unfounded) due process holding renders the Act's promise of final and binding arbitration illusory.

"Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc.*, 512 U.S. at 252; *Gunther*, 382 U.S. at 263-64 (RLA provides for a "'mandatory, exclusive, and comprehensive system for resolving grievance disputes'") (citation omitted); *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 613-14 (1959) (same). The goal was to keep "minor" disputes "out of the courts" and to ensure "finality of [Board] determinations." *Sheehan*, 439 U.S. at 94; *see also Price*, 360 U.S. at 616 ("Plainly the statutory scheme . . . was designed for effective and final decision of grievances which arise daily . . . ."); *Gunther*, 382 U.S. at 263 ("This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided *finally* by the Railroad Adjustment Board.") (emphasis added).

This is why Congress enacted a judicial review provision exceedingly limited in scope—one that this Court has recognized as "'among the narrowest known to the law.'" *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (citation omitted). Indeed, in 1966, Congress amended the RLA to narrow the scope of judicial review even further. In so doing, it rejected a railroad industry proposal that would have expanded judicial review to permit, *inter alia*, setting aside Board awards that were "contrary to constitutional right, power, privilege, or immunity." *See Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare*, 89th Cong. 123-44, 303-16 (1966).

Now nearly half of the country has adopted this rejected proposal by judicial fiat, expanded the "narrow" scope of review beyond permissible statutory bounds, and opened the door to dozens and dozens of arbitration award challenges asserting "due process" violations. This is to be expected. Any litigant can easily reframe its disagreement with an arbitral outcome as a question of due process. The sheer number of "due process" claims filed in courts in the Second, Fifth, Seventh, Eighth and Ninth Circuits in the last three decades—approximately sixty *reported* decisions—proves as much. And this was before the Seventh Circuit declared all "new" rules—*i.e.*, interpretations that a court decides are not obvious from the RLA or Circular One—constitute a due process violation if applied to the case at hand. Each case is distinct on its facts and any competent claimant can surely find some way to claim surprise. The Seventh Circuit has set a dangerous precedent by granting litigants leeway to dress up merits challenges in constitutional garb and run to the courts willing to entertain (if not grant) such review.

The resulting uncertainty and potential for protracted litigation has a dramatic impact on the efficiency and finality of NRAB awards. More than 150,000 Class 1 railroad employees are covered by the

RLA. In 2008 alone, thousands of claims under CBAs have been filed against the Petitioner, and nearly 1,500 have been submitted to arbitration. The costs and delay that would ensue from subsequent, expansive judicial review are tremendous. This case provides a telling example. Far from being an efficient vehicle to keep minor disputes out of the courts, the claims under review were first filed in 2002 and 2003, SA4 ¶11, and have been working their way through the court system for the past three-and-a-half years, SA1-13. The finality envisioned by the RLA cannot withstand this onslaught.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN GENERAL COMMITTEE OF
ADJUSTMENT, CENTRAL REGION,
Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellee.

No. 06-2542.

Argued: Feb. 7, 2007.
Decided: April 9, 2008.

522 F.3d 746

Before FLAUM, ROVNER, and EVANS, Circuit Judges.

ROVNER, Circuit Judge.

Five aggrieved railroad employees of the Union Pacific Railroad (Union Pacific or the Carrier) filed claims through their representatives on the Brotherhood of Locomotive Engineers and Trainmen (the Organization) in each case contesting a discharge or discipline imposed by the Carrier. Rather than resolving the dispute over the propriety of the discipline, the National Railroad Adjustment Board (NRAB or Board) concluded that the Organization had failed to submit conclusive evidence that the parties had held a conference to attempt to resolve the dispute—a procedural prerequisite to arbitration—and thus the Board determined that it was required to dismiss the claim for lack of jurisdiction. The district court agreed. Although we agree with the district court that it has always been clear that the parties must conference, and that they must submit evidence of that fact, it heretofore has not been clear when and how that evidence must be presented. We find that the Board denied the Organization due process by requiring evidence of conferencing to be presented in the on-property record, a requirement not clearly enunciated in the statutes, regulations, or the collective bargaining agreement of the parties. Consequently, we reverse.

I.

Grievance procedures for resolving disputes between railroads and their employees are regulated intricately under the Railway Labor Act (RLA or Act). Under the Act, railroad employees with grievances against their employers—the railroad—must first attempt to resolve those grievances through an internal process before turning to the courts. The procedure for dispute resolution is set forth in the parties' collective bargaining agreement and begins with investigations, hearings, and appeals that take place on the railroad property and are generally referred to as "on-property" proceedings. If one of the parties is dissatisfied with the result, the dispute is submitted to a conference. 45 U.S.C. § 152 Second. If the parties fail to resolve their differences in conference, an aggrieved party may initiate an arbitration proceeding before the NRAB. 45 U.S.C. § 153 First (i).

In 2000 and 2001, Union Pacific discharged or disciplined five locomotive engineers whose claims form the basis of this litigation. The Organization filed grievances and sought reinstatement, back pay, and removal of the discipline for the five engineers. The Organization then proceeded through the "on-property" process in the manner dictated by the collective bargaining agreement between the parties. Each aggrieved party had an on-property hearing before an investigating officer or superintendent of the carrier. In each case the hearings were recorded and transcribed with exhibits attached. The Carrier declined each of the claims. The parties then met in a conference in a last-chance effort to settle the case. When those efforts failed, and the Organization did not prevail, it sent letters of intent to the NRAB to initiate arbitration proceedings. In its original submission, the Organization included the on-property record which contained the notices of discipline, the hearing transcript, all of the exhibits, and all of the evidence used in the grievance procedure below relating to the merits of the underlying discharge or discipline. The Organization did not, however, include any written documentation that the parties had met in conference. The Carrier raised no objection to the Organization's submission and, in due course, presented its own counter-submission on the merits of the dispute. It did not mention the Organization's failure to include evidence that a conference had occurred.

After the parties filed their submissions, they met on March 15, 2005, for a hearing before the NRAB. Each arbitration panel of the Board consists of an equal number of members chosen by the carrier and by the labor organization. Where the panels are deadlocked, a neutral person known as a referee sits with the panel to make an award. 45 U.S.C. § 153 First (*l*). As a practical matter, therefore, the outcome is usually determined by the referee. *See United Transp. Union v. Gateway W. Ry.*, 284 F.3d 710, 711 (7th Cir.2002). Just prior to the start of the oral argument, the Carrier's representative on the panel requested an executive session of the NRAB panel, out of the presence of the Organization's representative. During that session, the Carrier's representative informed the referee that the Organization's submission to the Board did not contain any evidence of conferencing. Without such evidence, the railroad argued, the Board must draw the inference that the conferences had not occurred. The Carrier did not argue that conferencing had not occurred—indeed, it had—only that the Organization had failed to offer any evidence of it in the on-property record submitted to the Board.

The Organization's advocate offered to submit documentation that the conferences had occurred and the referee gave the Organization time to do just that. The Organization did eventually proffer proof that a conference had occurred, which included phone logs, informal notes, and other documents. The majority of the panel consisting of the neutral member and the Carrier's representative, however, voted not to allow this later submitted evidence, and voted to dismiss all five of the appeals for lack of jurisdiction.

In the five nearly identical decisions, the Board concluded that without evidence in the on-property record that the conference had occurred, it had no jurisdiction to consider the Organization's claims. (R.

at 1, Ex. A, Award Nos., 26089, 26090, 26092, 26093, 26094, all at p. 3) (App. at 16, 24, 37, 45, 53). The Board further concluded that it could not consider evidence not contained in the on-property record. *Id.* (App. at 17, 25, 38, 46, 54). The Organization's representative filed a dissent in each of the five awards.

The Organization sought review in the district court of all five of these identically reasoned awards pursuant to 45 U.S.C.A. § 153 First (q). In appealing to the district court to dismiss the complaint for failure to state a claim, the Carrier argued as a preliminary matter, that the NRAB's decisions were evidentiary rulings, which could not be set aside absent misconduct or bad faith by the arbitrator. It then sought to convince the district court that the conference is a mandatory precursor to arbitration, and that without written evidence of the conference—evidence that could not be added to the record later—the Board had no jurisdiction to hear the claim. The Organization countered that neither federal law nor the CBA required conferencing and that even if conferencing were required, no rule dictates that conferencing must be proved by evidence in the on-property record. Consequently, the Organization argued, the Board failed to conform to its jurisdiction and violated due process.

The district court concluded that conferencing is indeed required before parties can refer their disputes to the NRAB and that the NRAB did not violate due process by refusing to consider evidence of conferencing outside of the on-property record. Consequently, the district court dismissed the Organization's suit pursuant to Fed.R.Civ.P. 12(b)(6), concluding that the Organization had failed to state a claim upon which relief could be granted. On appeal, the Organization has not challenged the district court's holding that the RLA requires conferencing, but instead focuses on whether the NRAB denied due process and failed to act within the scope of its jurisdiction by requiring proof of conferencing in the on-property record.

II.

Although presented through both a statutory and constitutional framework, the essence of the conflict boils down to a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB? The district court answered this question affirmatively, and we review the district court's dismissal *de novo,* looking to see whether relief is possible under any set of facts consistent with the allegations set forth in the complaint. *Pokuta v. Trans World Airlines*, 191 F.3d 834, 839 (7th Cir.1999). In keeping with the purpose of the RLA—that is, to resolve railway labor disputes in an efficient manor—the jurisdiction of the federal courts is limited to only the narrowest review of NRAB arbitrators' decisions. *Union Pac. R.R. v. Sheehan,* 439 U.S. 89, 91, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978); *Pokuta,* 191 F.3d at 839. Under the RLA, federal courts may review a Board's decision only when (1) the Board has failed to comply with the requirements of the RLA; (2) the Board has failed to conform or confine itself to matters within the scope of its jurisdiction; and (3) the Board or one of its members has engaged in fraud or corruption. 45 U.S.C. § 153 First (q); *see also, Sheehan,* 439 U.S. at 93, 99

S.Ct. 399; *Pokuta*, 191 F.3d at 839. This circuit will also review claims of due process violations by the Board. *See, e.g., Pokuta*, 191 F.3d at 839, *Bates v. Baltimore & Ohio R.R.*, 9 F.3d 29, 31 (7th Cir.1993); *Morin v. Consol. Rail Corp.*, 810 F.2d 720, 722 (7th Cir.1987).

In this appeal, the labor Organization makes two claims, first, that the Board violated its due process rights and second, that it violated the RLA by failing to conform or confine itself to matters within the scope of its jurisdiction, as prohibited by 45 U.S.C. § 153 First (q). The Carrier urges this court to consider the statutory claim before the constitutional one. We agree that it is a "fundamental rule of judicial restraint" that we ought not pass on questions of constitutionality "unless such adjudication is unavoidable." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 14, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (Blackmun, dissenting). In this case, however, once we answer the key question at issue in this case, adjudication of the due process claim is unavoidable. That question is whether the NRAB created a new requirement when it held that arbitration could not proceed because the Organization had failed to present evidence of conferencing in the on-property record. If it did so, it ran afoul of the due process clause.

Answering this key question will also resolve the Carrier's threshold argument that this case is governed by the review standard of *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The Railroad Carrier characterizes the Board's award as a decision to admit or exclude evidence. Such decisions, absent bad faith or error, are left entirely to the discretion of the arbitrator. *Id.* at 40, 108 S.Ct. 364. Again, however, the application of this standard depends on the characterization of the Board's actions. If indeed the Board merely precluded the Organization from submitting evidence under its interpretation of an already existing rule, then we cannot overturn that finding unless we can show that the arbitrator acted in bad faith or that the error was so gross as to amount to affirmative misconduct. *Id.* at 40, 108 S.Ct. 364. If, however, the Board created a new rule which precluded the Organization from submitting evidence, then we are no longer evaluating a decision merely to admit or deny evidence. Once again, it becomes clear that resolution of all of the issues in this case depends on whether the Board created a new rule—a question to which we will turn shortly.

The Carrier's initial approach in the due process arena is to cast doubt on the law of this circuit that allows judicial review of Board orders where a party asserts a due process violation. This argument is based on scholarly theories that the only due process protections required are those already provided in the RLA itself. *See, e.g.,* Buck S. Beltzer & Stephen A. Wichern, *Judicial Review Under the Railway Labor Act: Are Due Process Claims Permissible?* 33 Transp. L.J. 197, 220-224 (2005); Christopher L. Sagers, Note, *Due Process Review Under the Railway Labor Act,* 94 Mich. L.Rev. 466, 469 (1995). The Supreme Court, however, has stated that unless it can be shown by clear and convincing evidence that Congress intended to foreclose judicial review, we must presume that courts may review constitutional questions. *Califano v. Sanders,* 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Nothing in section 153 First (q) of the RLA manifests clear and convincing evidence that Congress intended to foreclose judicial review of constitutional claims under the Act. *See Edelman v. W. Airlines*, 892 F.2d 839, 847 (9th Cir.1989). This circuit has pointed out that the decisions of the NRAB, "are acts of government, and must not deprive anyone of life, liberty, or property without due process of law." *Elmore v. Chicago & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir.1986). Consistent with that position, we have continuously held that we will review due process claims arising from NRAB arbitration. *See Pokuta*, 191 F.3d at 839; *Bates*, 9 F.3d at 31; *Morin*, 810 F.2d at 722; *Steffens v. Bhd. of Ry. Airline and S.S. Clerks*, 797 F.2d 442, 448 & n. 5 (7th Cir.1986). We have continually and consistently maintained this position despite a 1979 Supreme Court decision that created confusion in some circuits as to the validity of due process review of NRAB decisions. *See Sheehan*, 439 U.S. at 93-94, 99 S.Ct. 399. Despite the confusion, several circuit courts, including this one, have concluded that the *Sheehan* decision does not prohibit due process review of NRAB decisions. *See Steffens*, 797 F.2d at 448 & 449 n. 5. *See also Shafii v. PLC British Airways*, 22 F.3d 59, 63-64 (2d Cir.1994); *Hayes v. W. Weighing & Inspection Bureau*, 838 F.2d 1434, 1436 (5th Cir.1988); *Armstrong Lodge No. 762 v. Union Pac. R.R.*, 783 F.2d 131, 135 (8th Cir.1986); *Radin v. United States*, 699 F.2d 681, 684 (4th Cir.1983). We decline to depart from our prior holdings on this issue.

Due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That means, of course, that a tribunal may not alter, without warning, the rules for access to it. It is true that the requirements of due process are "relaxed when the tribunal is an arbitral tribunal rather than a court." *United Transp. Union,* 284 F.3d at 712. "In the arbitration context, due process is satisfied so long as the arbitrator provided a fundamentally fair hearing, one that meets the minimal requirements of fairness—adequate notice, a hearing on the evidence and an impartial decision by the arbitrator." *Int'l Bhd. Elec. Workers v. CSX Transp. Inc.,* 446 F.3d 714, 720 (7th Cir.2006). It is these minimal requirements, however, that the Organization claims that the NRAB failed to provide by creating and imposing a new rule, unknown to the Organization, that denied it access to a hearing on the substance of the dispute.

This court has considered the predicament created by newly implemented NRAB rules once before in *Chicago Rock Island and Pac. R.R. v. Wells,* 498 F.2d 913 (7th Cir.1974). In *Wells,* the railroad drafted a written request for an automatic extension of time to file its reply to Wells' claim of wrongful discharge. The letter bore a January 29 postage meter date, but a January 30 postmark. *Wells,* 498 F.2d at 917. The Board refused the railroad's request, declaring that the January postmark was one day too late. *Id.* At the time of the denial, the Board had no rule adopting a United States Postal Service postmark as the criterion for determining timeliness. *Id.* We held that the adoption of a new rule or policy without notice violated due process. *Id.* at 918. The court noted that the procedural defect of adopting a new rule that the United States postmark determined the timeliness of the request for an extension of time was one of "constitutional dimension." *Id.*

It is true that the railroad in *Wells* was denied an opportunity to make any presentation whatsoever to the Board, and in this case the Organization was permitted to argue its position regarding whether the absence of evidence of conferencing mandated dismissal. In this case, however, imposition of a new procedural rule without adequate notice to the parties denied those parties first, and most importantly, the opportunity to comply with the rule, and ultimately, a fair opportunity to be heard. Had the Board permitted the Organization to submit evidence of the conference for its consideration once the issue had been raised, the Organization then could have proceeded to argue that Engineers Glueck, South, Whatley, Fosha and Pope were not deserving of the discharge or discipline they received. Instead, the Board allowed the Carrier to raise the conferencing issue at a late date, but refused to consider any evidence that the procedural prerequisite had been met. In this way, the facts and conclusion of *Wells* bear most heavily on this case.

The Carrier downplays *Wells* as a pre-*Sheehan* case, but nothing in *Sheehan* alters our due process analysis. Indeed, as we noted above, this court has issued many decisions since *Sheehan* noting our ability to review claim of due process violations in NRAB proceedings. *See, e.g., Pokuta,* 191 F.3d at 839; *Bates,* 9 F.3d at 31; *Morin,* 810 F.2d at 722; *Steffens,* 797 F.2d at 448 & n. 5. We can conclude from *Wells* that if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process that prevented the substance of the Organization's claim from being heard. This is not only an obvious conclusion from *Wells* and from the mandates of due process, but from the fundamental rule of social interaction we all learned on the kindergarten playground. It is unfair to alter the rules of the game mid-play. We can now turn to the question of whether, in fact, the Board created a new rule.

The crux of the Organization's principal argument in this case is that the district court combined two discreet rules to announce a new rule not articulated in a statute, rule, or the collective bargaining agreement between the parties. The first of these rules is that, before initiating arbitration, the parties must confer after the carrier's highest designated officer has rejected the labor union's appeal. The second of these rules is that parties to arbitration must present all of their evidence to the Board in the on-property record and that new evidence cannot be added on appeal to the Board if it was not presented to the railroad during its on-property review.

The Carrier leads its argument with proof of the first rule—that the RLA and the governing regulations require conferencing. Indeed § 2 Second of the RLA states that "[a]ll disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. § 152 Second. This same language appears in Circular One-the common name given to the series of rules and regulations that the NRAB adopted in 1934 to govern its internal procedures. 29 C.F.R. § 301.1(b).

Although the Organization argued below that conferencing was not, in fact, required, it is no longer asserting that position on appeal. Consequently, we can assume that parties may not proceed to arbitration until they have held a conference and made a final attempt at resolving their differences. We need not, however belabor this point much. The fact of a conference *vel non* is not in dispute. The Organization adamantly asserts, and Union Pacific does not deny, that the parties met in conference. We can now focus our review on the more narrow question of when and how a party must prove to the NRAB that conferencing has occurred.

Union Pacific's position is that evidence of conferencing must be contained in the on-property record; that is, it must be in writing and it cannot be presented once the on-property record has been closed and presented to the Board. The Organization counters that these requirements have been made from whole cloth and are not contained in the RLA, in Circular One, or in the collective bargaining agreement between the parties. The Organization argues that if the Carrier may raise, for the first time, the question of jurisdiction after the parties have submitted their materials to the Board and the record is closed, then, in fairness, the Organization must be allowed the opportunity to present evidence in response. Or, the Organization argues, the Carrier must not be permitted to raise the question after the on-property record has closed.

As support for its position, the railroad Carrier cites ten arbitration awards in which the Board dismissed cases where there was no evidence of conferencing in the on-property record. *See* Brief of Defendant-Appellee Union Pacific Railroad at pp. 28-29. In the bulk of those awards, however, it was either uncontroverted or clear from the record that the parties had not held a conference on the property prior to submitting the dispute to arbitration. *See* Third Division Award, No. 3203 (R. at 21, Ex. B) (App. at

133) ("It is unrefuted that no conference was held on the property.");[1] Third Division Award, No. 30114 (R. at 21, Ex. B) (App. at 117) ("it is abundantly clear that at no time during the on-property handling of the case was a conference held to attempt to resolve this dispute"); Third Division Award, No. 4931 (R. at 21, Ex. B) (App. at 128) ("The record is clear. A conference at the highest level was not held."); Third Division Award, No. 30260 (R. at 21, Ex. B) (App. at 115) ("It is clear from the record in this case that the instant Claim was not conferenced by the Organization on the property."); Third Division Award, No. 12475 (R. at 21, Ex. B) (App. at 103-04) (noting that the "Carrier submits that no conference was held by the parties on the property prior to this appeal" and then finding that "no conference was held prior to its submission to the Board"); Third Division Award, No. 33916 (R. at 21, Ex. B) (App. at 106) ("no conference was ever held on the property"); Third Division Award, No. 27482 (R. at 21, Ex. B) (App. at 126) ("From the record, it appears that Claimant did not further pursue either Claim on the property and did not engage in a conference as required.").

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[1] At oral argument the Carrier was asked whether there were any awards among those cited in its brief in which it was undisputed that a conference had not occurred. The Carrier asserted that the Boards' awards do not reveal one way or the other. Oral argument, February 7, 2007, at 11:16-12:02. The Boards awards do reveal that in at least one case it was unrefuted that conferencing had not taken place. In other cases, the Board announced that it was clear that conferences had not occurred. This is a minor point, however, for as we discuss further, *infra*, prior Board awards may be instructive, but hold no precedential value.

In three of the awards, the Board merely notes that there is no evidence in the record that conferencing occurred at all and thus we cannot definitively determine whether the parties failed to meet in conference or whether they met but neglected to submit evidence of that conference. *See* Third Division Award, No. 18679 (R. at 21, Ex. B) (App. at 97) ("In a review of this record we fail to find any evidence that [a] conference was ever held on the property."); Third Division Award, No. 30821 (R. at 21, Ex. B) (App. at 112) ("Nowhere does the record indicate that a conference was ever held or requested on the property."); Third Division Award, No. 22428 (R. at 21, Ex. B) (App. at 96) ("The record before the Division is devoid of any evidence that [a] conference was held."). Consequently, these prior Board awards do not indicate whether the Board dismissed the cases because conferencing did not occur (a fact which would support the Organization's position) or because the parties did not put written evidence of conferencing in the on-property record (a fact which would support the Carrier's position). The Organization argues that "there is not a single award that says conferences must be proved only by documents that were previously exchanged by the parties and then attached as exhibits to the 'on-property record.' " (Reply Brief at 4). It is true that the Railroad has not cited such an award. The district court too admitted that, "no Board opinion expressly states that the Board will not consider evidence of conferencing outside of the record." (R. at 40, p. 13). The district court, however, seemed convinced that "Board precedent on conferencing cites the lack of evidence *in the record* as the basis for its decision." *Id.* (emphasis in original). We do not read the language of the awards in quite the same way.

True, the Board dismissed each of these awards for lack of jurisdiction.[2] It is unclear, however, whether it based its decision on the lack of evidence in the on-property record, as the district court concluded, or rather because it was clear that conferencing, the procedural prerequisite to arbitration, had not occurred. In short, the awards make clear that the parties must conference. But these prior awards are no more illuminating than the RLA in articulating how a party must prove that a conference occurred.

Moreover, although study of prior arbitration awards is useful, the awards are not conclusive. Arbitrators can and do consider the language of other awards in determining the outcome of matters before them, but they are not bound by the outcome of prior decisions in the same way that judges are bound by the doctrine of *stare decisis* in courts. *See* Ray J. Schoonhoven, *Fairweather's Practice and Procedure in Labor Arbitration,* 521-525 (4th Ed.1999); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: a Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer,* 44 Hastings L.J. 1187, 1197 (1993); Timothy J. Heinsz, *Grieve it Again: of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration,* 38 B.C. L.Rev. 275, 277 (1997); Carlton Snow, *An Arbitrator's Use of Precedent,* 94 Dick. L.Rev. 665, 672-74 (1990). There are myriad reasons for the non-precedential nature of prior awards. The Organization touched on some of them in its reply brief by pointing out that awards are not codified, not wholly accessible to non-parties, and contain sketchy accounts of the record. Moreover, issues that confront labor arbitrators are often quite fact specific and involve evaluating not only the action leading to the discipline or discharge but also the fairness of the rules established and applied by the employer and the relationships between the parties. *See* Heinsz, 38 B.C. L.Rev. at 294-95. In any event, the awards only tell us what we already knew—first, that parties must conference, and second, that they must demonstrate to the Board that they have conferenced. What they do not tell us is how or when a labor organization must prove that a conference occurred. Could it not, for example, arrive at the NRAB hearing with an audio recording of the conference?

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[2] The Board did not always use the "lack of jurisdiction" language in the awards cited *supra*. Sometimes it merely stated that it had no authority to hear the case or that it had to be dismissed because of a procedural flaw.

Our exploration of prior awards has diverted us from a more relevant path—the statutes and regulations of the RLA. The Carrier asserts that Section 2 Second is the key statutory provision governing conferencing. *See* 45 U.S.C. § 152 Second. As we noted, however, this section instructs that the parties must conference but offers no guidance as to how proof of conferencing must be presented to the Board. According to 29 C.F.R. § 301.5(d), employees must submit to the Board a document which "clearly and briefly set[s] forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute." In other words, an employee must submit to the Board everything that the employee used to attempt to convince the railroad not to discipline or discharge her. Of course the employee never used the fact of conferencing "in the support of [her] position," and it was never part of "the particular question in dispute," and therefore it would not appear to be required by 29 C.F.R. § 301.5. The Organization advises that there may not be documentary evidence of conferencing at all. In fact, the collective bargaining agreement between the parties in this case dictates that the parties may hold pre-hearing conferences by telephone. Consequently, evidence of the conference might appear as a note in a calendar scheduling a face to face conference. It may be in the form of a telephone bill from the carrier's conference officer to the union. Neither of these forms of evidence were "presented to the carrier" or were used as evidence "in support of" the employees' position. Section 301.5 of the regulations, therefore, likewise fails to provide any rule that evidence of the conference must be presented in the on-property record.

Thus far our examination of prior awards, 45 U.S.C. § 153 First (q), and 29 C.F.R. § 301.5 has failed to uncover a rule that evidence of the conference must be contained in the on-property record. Is there a rule that would bar a labor organization from doing just what the Organization did here—presenting evidence of the conference after the on-property record has closed and been submitted to the Board? The Carrier argues there is.

The Carrier reasons, and the district court agreed, that the Organization is barred from submitting this later filed evidence of conferencing by the NRAB's precedential rule that it cannot consider "new evidence" not contained in the on-property record. The NRAB functions in an appellate-like manner and so the rule against accepting new evidence follows logically. First, it fulfills the goal of the RLA to encourage prompt resolution between the parties without resort to costly, repetitive, and antagonistic processes. In order to give the employer a full and complete stab at resolving the issue on its own, the labor union must present all of its evidence on the merits to the employer's decision maker (usually an investigating officer or superintendent of the carrier) before turning to arbitration. Second, the NRAB is reviewing the actions of the carrier. In other words, the Board must assess the following: based on what the carrier knew and saw, was the carrier's discipline fair? For this reason the Board cannot evaluate new evidence. The same reasoning does not hold true for evidence of conferencing, however. The conference is the last ditch effort to resolve the dispute on the property without the help of outsiders, and it occurs after the on-property hearing before the carrier's Superintendent or investigating officer. The fact of conferencing was not one of the factors that the carrier's disciplinarian considered in making its decision.

In fact, of all the arbitration awards that Union Pacific cites for the proposition that the Board cannot review new evidence, in each case the new evidence that the party sought to admit was evidence relating to the merits of the dispute. For example, the Board presents Award No. 25994 as support for the proposition that the Board cannot consider new evidence.[3] In that case, the Organization claimed that the Carrier had not reviewed a transcript of the investigation prior to imposing discipline and therefore had not provided the employee with a fair and impartial investigation as required by the collective bargaining agreement. (R. at 21, Ex. B) (App. at 63). The Organization further contended that the Carrier omitted the date on the transcript to obfuscate the fact that the Carrier's decision maker had not considered the record of investigation. The Board concluded that, despite the fact that a date on the transcript would have provided "a straightforward means of ascertaining whether the Superintendent had the transcript before rendering his decision," the Carrier did not supply that information to the Board, and thus it was entitled to infer that the withheld evidence would not have been favorable to the Carrier. *Id.* at 65.

The Carrier describes this award as enforcement of a "hyper-technical" rule about dating a transcript. The date on the investigative transcript, however, was more than a simple formality or rule; the date of the transcript turned out to be the key to the substantive question in the case—that is, did the Carrier review the transcript before imposing discipline? If the Carrier had submitted new evidence regarding the date to the Board, evidence that was not presented below, the Organization would have been at a distinct disadvantage. It could not have gone back to do its own investigation and present evidence to try to refute the proposed date of the investigation transcript. As the dissenting arbitrator in the NRAB awards at issue in this case pointed out, "new evidence is disallowed by the Board when it represents an attempt to blind side one party or another." (R. at 1, Ex. A) (App. at 20). In this case, in contrast, there was no question that the parties had met in conference and therefore the presentation of new evidence in no way prejudiced the Carrier. To the contrary, any blindsiding came from the Carrier's actions. When the Organization filed its Notice of Intent to proceed to arbitration, it forwarded a copy of the on-property record to the NRAB, and, of course, to the Carrier. It was clear from the face of the documents that the on-property record lacked any written evidence that a conference had occurred. The Carrier, however, did not object to the lack of evidence of conferencing. Instead, it responded substantively to the merits of the claims and the parties proceeded to arbitration. Only on the eve of arbitration—when the Carrier claims the record was closed to all new submissions—did it raise its objection to the lack of evidence.

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[3] The parties in that arbitration were the same parties involved in this litigation.

The regulations require each party to submit all supporting evidence in its original submission to the Board. 29 C.F.R. § 301.5(d), (e). If these regulations require the Organization to submit "everything" in the original submission to the Board, then it must also be true that the Carrier was required to present "everything" in its original submission to the Board—including its claim that there was no evidence of conferencing. *See also* 29 C.F.R. § 301.7(b) ("the parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence."). Fundamental fairness requires either that the Carrier be required to raise its objection when the labor union can still respond and present evidence of conferencing or, if it bars the labor union from presenting new evidence, then it must also bar the Carrier from raising the argument after the original submission has been filed.

Before we conclude, it is worth emphasizing that our review of NRAB awards remains exceptionally narrow. This circuit respects the finality of NRAB awards and the independence of carriers and employees to create contracts governing resolution of their disputes. As we have said before, the question before a federal court "is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1195 (7th Cir.1987). An arbitration award made by the Board may be overturned "only if the reviewing court is convinced that [the arbitrator] was not trying to interpret the collective bargaining contract, but that instead he resolved the parties' disputes according to his private notions of justice." *Bhd. of Locomotive Eng'ring v. Atchison, Topeka and Sante Fe R.R.*, 768 F.2d 914, 922 (7th Cir.1985). When a Board creates a new requirement on its own, it is not interpreting a CBA or following the dictates of the RLA or its regulations. Our prior precedent in *Wells* instructs that such changes in the rules violate the due process rights of the parties. This case presented a unique situation which we doubt will come before a court again: that is where the parties actually did meet in conference, but the labor organization failed to present such evidence to the Board in its initial submission, where the carrier likewise failed to object to the lack of evidence in its initial submission to the Board, and where the labor organization could and did present evidence of conferencing prior to a hearing on the underlying dispute. Because no statute, regulation, or CBA required the evidence to be presented in the on-property record, because the Carrier could not have been prejudiced by the tardy submission of evidence, and because the Organization was prejudiced by the late objection, we find that the Board's decision to dismiss violated the due process rights of the Organization. The district court issued a thoughtful decision, but for the reasons articulated above, it must be REVERSED.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION, Plaintiffs,

v.

UNION PACIFIC RAILROAD, and, NATIONAL RAILROAD ADJUSTMENT BOARD, Defendants.

No. 05 C 2401

May 15, 2006

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432 F. Supp. 2d 768

MEMORANDUM OPINION AND ORDER

KENDALL, District Judge.

The Brotherhood of Locomotive Engineers and Trainmen (the "BLET" or the "Organization") brings this action under Section 3 First (q) of the Railway Labor Act ("RLA" or "Act"), 45 U.S.C. § 153 First (q), to vacate a set of awards issued on March 15, 2005 by the National Railroad Adjustment Board (the "NRAB" or the "Board"). In those awards, the NRAB dismissed each of five grievance claims against Union Pacific Railroad (the "Carrier") upon its finding that "since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim." Before the Court now is the Carrier's Motion to Dismiss the Organization's Petition to Review and to Vacate Awards. Accepting all well-pled facts in the Petition and drawing all reasonable inferences in favor of the Organization, this Court holds that: (1) the RLA requires conferencing even if a collective bargaining agreement ("CBA") does not require conferencing, (2) the Board did not unlawfully limit its jurisdiction by refusing to consider evidence of conferencing outside of the on-property record and (3) the Board's procedure did not violate due process. Accordingly, the Carrier's Motion to Dismiss is granted.

The Railway Labor Act

Congress enacted the RLA in 1926 to promote the speedy and peaceful resolution of railroad labor disputes.[1] *See Union Pacific Railroad v. Sheehan,* 439 U.S. 89, 94, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978); *Kulavic v. Chicago & Illinois Midland Ry.,* 1 F.3d 507, 515 (7th Cir.1993). The RLA established a "mandatory, exclusive, and comprehensive system for resolving grievance disputes" between railroads and their employees. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33, 38, 83 S.Ct. 1059, 10 L.Ed.2d 172 (1963). As part of this system, the RLA called for unsettled minor disputes to be referred to local boards of adjustment. These early adjustment boards, however, were established by voluntary agreement of the parties and lacked the authority to bind the parties. *See Brotherhood of Railroad Trainmen v. Chicago River & I.R. Co.*, 353 U.S. 30, 36, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957). These boards also were "composed of equal numbers of management and labor representatives and deadlocks over particular cases became commonplace. Since no procedure for breaking such deadlocks was provided, many disputes remained unsettled." *Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 610, 79 S.Ct. 1351, 3 L.Ed.2d 1460 (1959). Congress amended the RLA in 1934 to deal with these early difficulties, abolishing the voluntarily-created local boards of adjustment in favor of a national board and providing that "[u]pon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members ... then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof, and make an award." 45 U.S.C. § 153 First (*l*); *see Brotherhood of Railroad Trainmen v. Chicago River & I.R. Co.*, 353 U.S. 30, 36-37, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957) (National Railroad Adjustment Board "mak[es] it unnecessary for parties to agree to establish their own boards"). The current National Railroad Adjustment Board is composed of four divisions, each division having jurisdiction over disputes involving different classes or crafts of employees. *See* 45 U.S.C. § 153(h).

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[1] The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. 45 U.S.C. § 151a.

Among its roles, the RLA provides the machinery for resolving minor disputes between individual employees and their employers, where such disputes arise out of grievances or the interpretation of agreements concerning rates of pay, rules or working conditions. The first steps in the dispute resolution process take place on the railroad property. *See Ryan v. Union Pacific R.R.*, 286 F.3d 456, 458 (7th Cir.2002). The parties' CBA here provides for an "on-property" process that includes a series of investigations, hearings and appeals up to the designated Labor Relations officer. *See* Petition, Exhibit B at A-34 to A-36. Disputes that cannot be resolved on the property may be referred to the NRAB. *See* 45 U.S.C. § 153 First (i); *Ryan*, 286 F.3d at 458. In between these two stages, and at the center of the controversy in this case, is so-called "conferencing." The RLA discusses conferencing in two provisions:

> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

45 U.S.C. § 152, Second.

> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees,

> within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, *That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.*

45 U.S.C. § 152, Sixth (emphasis added). This statutory text, read in light of the historical purpose of the RLA, ultimately must guide this Court's resolution of the questions presented. *See Burlington N. R.R., Co. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 444, 107 S.Ct. 1841, 95 L.Ed.2d 381 (1987) ("The Railway Labor Act 'cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve'"), quoting *Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711, 751, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945) (Frankfurter, J., dissenting).

The Organization's Allegations

The Organization's petition seeks review of five awards issued by the First Division of the NRAB on March 15, 2005. (Compl.¶ 1.) The BLET and Union Pacific are parties to several agreements covering employees in the territory designated by Union Pacific as the Central Region. (Compl.¶ 8.) The Organization filed five claims with the Carrier relating to discipline decisions that the Carrier allegedly made in violation of one of the collective bargaining agreements. (Compl.¶ 11.) Pursuant to the terms of the collective bargaining agreement, the parties then engaged in an on-property investigation of the claims. (Compl.¶ 12.) After these on-property proceedings, the Organization alleges that it held a conference with the Carrier regarding the claims. (Compl.¶¶ 13-14.) Failing to resolve the claims at the conference, the Organization sent a letter of intent to the NRAB to initiate hearings on the claims. (Compl.¶ 14.) In the letter of intent, the Organization did not allege that conferencing had occurred. (Compl.¶ 15.) The Carrier did not raise an objection regarding the lack of conferencing prior to or when the Organization filed its letter of intent. (Compl.¶ 18.) Indeed, neither party discussed conferencing in any of their pleadings or papers filed with the NRAB. (Compl.¶ 19.) The Carrier Board Member first raised an objection based on the lack of conferencing at the executive session of the NRAB held just prior to a March 18, 2004 hearing on these claims. (Compl.¶ 20.) The Organization argued that the Carrier's objection was untimely, but nevertheless offered to submit evidence that conferencing had, in fact, occurred. (Compl.¶ 22.) The neutral member of the NRAB panel, Referee Goldstein, initially said he would allow the submission of evidence on whether conferencing occurred but later refused to consider the evidence. (Compl.¶¶ 23, 25.) The NRAB then issued awards dismissing the five disciplinary claims, explaining in each:

> The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record where, in order to be

> considered by the Board, it must reside. Therefore, the Organization's belated production of support evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

See, e.g., Petition, Exhibit A, Award No. 26089, at 3.

DISCUSSION

When considering a motion pursuant to Rule 12(b)(6), a court must take as true all facts alleged in the complaint and construe all reasonable inferences in favor of the plaintiff. *See Murphy v. Walker*, 51 F.3d 714, 717 (7th Cir.1995). A Rule 12(b)(6) motion will not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Section 3 First (q) of the RLA allows this Court to set aside a NRAB award in whole or in part, or to remand a matter, when the Board: (1) fails to comply with the requirements of the RLA; (2) fails to confine itself to matters within its jurisdiction; or (3) a member of the board engages in fraud or corruption in making the award. *See* 45 U.S.C. § 153 First (q); *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 93, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978) ("Only upon one or more of these bases may a court set aside an order of the Adjustment Board"). In this circuit, an award also may be vacated if the NRAB denied a party due process. *See Steffens v. BRAC*, 797 F.2d 442, 448 and n. 5 (7th Cir.1986).

The Organization argues that, in issuing its awards, the NRAB failed to comply with the Act, failed to conform to its jurisdiction and violated due process.

Specifically, the Organization challenges the Board's ruling that it lacked jurisdiction to review the merits of the claims because "all evidence of the *statutorily required conference* is entirely absent from the *on-property record.*" From this holding thus arise the two principle questions that this Court must answer. First, does the RLA require conferencing when the parties' CBA does not require conferencing and second, must evidence of the conference be contained in the on-property record.

"Conferencing" Requirement

This Court begins its analysis with the language of the statute itself—§ 152 Second states that "all disputes ... shall be considered ... in conference." 45 U.S.C. § 152, Second; *see Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) (statutory construction starts with text of the statute). Standing alone, this section is unequivocal that conferencing shall occur in all disputes. The Organization, however, argues that to be understood properly the prescription in § 2 Second must be read in conjunction with §§ 2 Sixth and 3 First (i). Taking into account these other sections, the Organization argues that the RLA does not mandate conferencing prior to referring a dispute to the NRAB when the parties' collective bargaining agreement does not require a conference to be held as part of its grievance process.

The NRAB's decisions on conferencing uniformly hold that "the failure to hold a conference on the property deprives the Board of jurisdiction to hear [a] dispute." Third Division Award No. 30260 (July 19, 1994), at 2; *see* Third Division Award No. 30114 (Apr. 4, 1994), at 2 ("It is well settled by the board that such a conference between the parties is mandatory and is a jurisdictional requirement"). Speaking more directly to the Organization's interpretation of the RLA, the Board held that: "Section 2, Second of the National Railway Labor Act—in clear, concise language—calls for a conference of the parties on the property prior to submission of a claim to this Board. Section 2, Sixth, of this Act does not in any way alter the mandatory provision of Section 2, Second; it merely gives to either party the right of requesting a conference and imposes a time limit within which to confer after a request has been made." Fourth Division Award No. 4931 (Sept. 22, 1994), at 2, quoting Third Division Award 14873 (October 21, 1966), at 5.

As the body created to administer the RLA, deference usually is given to the NRAB's construction of the Act.[2] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). An agency's determination of its own jurisdiction must be reviewed de novo, however. *See Northern Illinois Steel Supply Co. v. Secretary of Labor*, 294 F.3d 844, 846-47 (7th Cir.2002). The NRAB's decisions requiring that a conference be held on all disputes appear to fall within the Seventh Circuit's proscription on giving deference to an agency's determination of its own statutory jurisdiction.[3] *See McCarthy v. Madigan*, 503 U.S. 140,

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[2] The parties briefly reference the regulations implementing the conferencing requirement and other provisions of the RLA. *See* 29 C.F.R. 301, *et seq.* Since these regulations simply parrot the statutory language they provide no help in interpreting the statute.

[3] Given Congress' delegation of authority to the NRAB and the NRAB's expertise in the labor dispute process, it seems anomalous not to afford its decisions on conferencing the usual

144, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992) (judicially imposed exhaustion requirements are prudential while statutory exhaustion requirements are jurisdictional). In the end, such deference is unnecessary since the Court agrees with the NRAB's reading of the RLA.

Section 2 Sixth states "[t]hat nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." At first glance, this admonition indicates that § 2 Second's conferencing requirement should not be construed supercede the dispute resolution process negotiated in the parties' collective bargaining agreement. But such an interpretation would ignore the context of the quoted sentence. *See Barmes v. U.S.*, 199 F.3d 386, 389 (7th Cir.1999) ("[A] particular section or sentence of a statute must be interpreted in the context of related sections and the purpose of the statute as a whole"). Section 2 Sixth deals with the time, place and manner that a conference shall be held. *Id.* It first requires that within 10 days of notice from either party of a desire to confer, the parties' representatives must "specify the time and place at which a conference shall be held." The subsequent sentences in § 2 Sixth then limit the time and place of such conference. The final sentence concluding "[t]hat

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deference. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-82, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (Scalia, J., concurring) (reasoning that *Chevron* deference should apply to an agency's interpretation of its own statutory jurisdiction); *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 765, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (citing numerous cases in which Supreme Court has given an agency's interpretation of its own jurisdiction deference). Nevertheless, this Court, bound by Seventh Circuit precedent, reviews de novo the question of the NRAB's jurisdiction.

nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." In context, the last sentence of § 2 Sixth logically reads as an additional limit on the time and place of the conference rather than an allowance for the parties to bargain as to whether a conference is held at all. In the same way, § 2 Sixth does not prevent the parties from negotiating the company level procedures leading up to the conference, but it does not permit them to displace the conferencing requirement itself. *See Pawlowski v. Northeast Illinois Commuter Railroad Corp.*, 186 F.3d 997, 1002-03 (7th Cir.1999) (interpreting § 2 Sixth to mean that "railroads and unions remain free to establish by agreement the procedures for investigative and disciplinary proceedings at the company level ... so long as the right to confer over disputes arising from them is preserved, the RLA is not offended").

Section 153 First (i) states that "[t]he disputes between ... a group of employees and a carrier ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," and if no resolution is reached the matter may be submitted to the Adjustment Board. 45 U.S.C. § 153, First (i). "[T]he 'usual manner' provision allows the railroad and the union to prescribe *in the collective bargaining agreement* the manner in which grievance proceedings shall be conducted on the property." *Ryan v. Union Pacific R.R.*, 286 F.3d 456, 459 (7th Cir.2002) (holding that the usual manner is defined by the terms of the collective bargaining agreement) (emphasis in original). The conference described in § 2 Second, however, is a separate, intermediate step that follows the other on-property proceedings. *See Pawlowski*, 186 F.3d at 1003 (holding that "where a[CBA] is in place, the invocation of that agreement's grievance procedure is a necessary prerequisite to any statutory right to a conference with union representation under § 152 Second"). As such, § 3 First (i)'s "usual manner" provision does not subject the conferencing requirement to the terms of the parties' collective bargaining agreement. *See Ryan*, 286 F.3d at 459 ("[T]he proceeding on the property, is to be conducted in the usual manner, that is, in the manner agreed upon by the railroad and the union. *That* stage is for them to design as well as to administer") (emphasis in original).

Finally, the statutory requirement of a conference facilitates the purpose of the RLA—that is, to create a comprehensive and mandatory process for the prompt and orderly settlement of railway labor disputes. *See* 45 U.S.C. § 151a; 45 U.S.C. § 152 First ("It shall be the duty of all [parties] to exert every reasonable effort ... to settle all disputes"). As explained in one Board decision:

> The mandatory conference not only permits an in-depth discussion of each party's evidence to avoid undue surprise at the later, formal adjudicatory stage (if necessary) but it also encourages the parties to explore all avenues of possible settlement to promote the voluntary resolution of disputes. Had Claimants and the Carrier held a conference, they might have been able to reach a mutually satisfactory accommodation on this claim. The Railway Labor Act's dispute resolution process is designed to force the parties to attempt to reach a settlement even if one party perceives little

> likelihood of successfully resolving the case before resorting to the Board.

Third Division Award No. 28896 (July 30, 1991), at 1-2; *see* Third Division Award No. 18964 (Jan. 27, 1972) ("[I]t is the intent of the Railway Labor Act that issues in a dispute before this Board shall have been framed by the parties in conference on the property"). The United States Supreme Court has spoken similarly:

> [O]ne of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it.

Elgin, J. & E. Ry., 325 U.S. at 712 n. 12, 65 S.Ct. 1282.

While the §§ 2 Sixth and 3 First (i) permit the parties, in their collective bargaining agreement, to set terms regarding the time and place of conference and prescribe the manner in which grievance proceedings shall be conducted on the property, they do not allow the parties to eliminate § 2 Second's requirement that a conference actually be conducted prior to referring the dispute to the NRAB.

Evidence of Conferencing in the On-Property Record

After determining that the RLA required the parties to confer before it could have jurisdiction to hear their dispute, the NRAB refused to consider evidence outside of the on-property record that the conference occurred. The NRAB held that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The NRAB reasoned that its function was similar to an appellate tribunal and it therefore was restricted from considering new evidence or arguments not contained in the on-property record. The opinion also concluded that the Carrier's objection was timely raised. The Board cited numerous awards as precedent for each holding in its opinion.

This Court may provide the Organization relief only if the NRAB's refusal to consider evidence of conferencing outside of the on-property record was motivated by bad faith or misconduct or deprived the Organization of its due process right to a fundamentally fair hearing.[4] *See United Paperworkers Int'l Union v. Misco,* 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) (holding that NRAB's procedural and evidentiary rulings must be upheld absent bad faith or misconduct); *National Post Office v. U.S. Postal Service,* 751 F.2d 834, 841 (6th Cir.1985) (due process requires arbitrator to provide "a fundamentally fair hearing"); *Transportation*

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[4] The Seventh Circuit, like the Second, Fifth, Eighth and Ninth Circuits, allows federal courts to review due process claims under the RLA. *See Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7th Cir.1999); *Goff v. Dakota, Minnesota & E. R.R. Corp.*, 276 F.3d 992, 997 (8th Cir.2002); *Atchison, Topeka and Santa Fe Ry. Co. v. United Transp. Union,* 175 F.3d 355, 357 (5th Cir.1999); *Shafii v. PLC British Airways,* 22 F.3d 59, 64 (2d Cir.1994); *English v. Burlington N. R.R. Co.*, 18 F.3d 741, 744 (9th Cir.1994).

The Third, Sixth, Tenth and Eleventh Circuits have held that federal courts are precluded from reviewing due process claims arising from NRAB decisions. *See Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 (10th Cir.2004); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 911-12 (3d Cir.1981); *Henry v. Delta Air Lines,* 759 F.2d 870, 873 (11th Cir.1985); *Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n. 2 (6th Cir.1986).

Communications Int'l Union v. Chicago, West Pullman & S. R.R., 1992 WL 229545, *3, 1992 U.S. Dist. LEXIS 13693, *8-9 (N.D.Ill.1992) (stating that "labor arbitrators are free to decide whether to consider any piece of evidence and such decisions are not subject to judicial review"). The Organization does not allege that the NRAB decision was actuated by bad faith or misconduct, but does feel that the decision denied it due process. As to due process, the Organization argues that no precedent existed for the Board's decision, the decision applies a hyper-technical rule of procedure and the Carrier's untimely objection was unfair.

To begin, the Court respectfully disagrees with the Organization's assertion that "[u]ntil the awards issued in this case, 'conferencing' of discipline cases has never been deemed a 'jurisdictional issue' in discipline cases." Plf's Opp. at 4-5. The Board's jurisprudence has long been settled that conferencing is a prerequisite to its exercise of jurisdictional over a dispute.[5] *See* Third Division Award No. 30114 (Apr. 4, 1994), at 2 ("It is well settled by the board that such a conference between the parties is mandatory and is a jurisdictional requirement"). Beyond this first point, the Organization argues that even if conferencing were required, it violates due process not to allow them to submit evidence on the issue outside of the on-property record. The Organization first charges that the rule limiting the evidence of conferencing to the record was "made up on the spot, and applied retroactively to a party which had no reason to anticipate its application in this way." Admittedly, no Board opinion expressly states that the Board will not consider evidence of conferencing outside of the record. At the same time, Board precedent on conferencing cites the lack of evidence *in the record* as the basis for its decision. *See* Second Division Award No. 12475 (Nov. 4, 1992), at 3 ("[T]here is nothing in the record to establish that a conference was held on the property"); Third Division Award No. 30821 (Apr. 27, 1995), at 1 ("Nowhere does the record indicate that a conference was ever held or requested on the property"). And the Board's precedent that it will not consider evidence or arguments not contained in the on-property record is quite clear. *See* Third Division Award No. 30862 (May 10, 1995), at 8-9 (citing numerous awards applying this rule); Second Division Award No. 6883 (June 25, 1975), at 2 (noting that "[a]wards of all divisions of the National Railroad Adjustment Board upholding this principle are legion"). The Organization does not challenge the reasoning or authority of this latter precedent, only its application to the facts in this case. The Organization asserts that the NRAB's limitation on considering new evidence and arguments relates only to new evidence and arguments on the merits of the case, not evidence of conferencing. The Court does not disagree with the Organization's reading of the precedent or the logic of its distinction but the question is whether the refusal to accept evidence outside of the on-property record is a violation of due process.

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[5] *See also* Third Division Award No. 30260 (July 19, 1994), at 2 ("Following a long line precedents, the Board concludes that the failure to hold a conference on the property deprives the board of jurisdiction to hear the dispute"); Fourth Division Award No. 3203 (July 7, 1975), at 2 ("[T]he lack of on-property conference and/or lack of request for same is generally recognized as presenting a question of this Board's jurisdiction to handle the claim")

Despite the Organization's well-taken arguments, the Organization concedes at several points that it easily could have included such evidence in the record submitted to the Board.[6] *See, e.g.*, Plf's Opp. at 17-18 ("[T]he Organization could have responded in the opening brief ('yes, conferencing did occur') and these cases would not now be before this Court"). Thus, the Organization does not allege that it could not present evidence of conferencing to the Board through its notice of intent or opening submission but instead that it did not present such evidence "[s]ince conferencing is not required by the system wide agreement, and was never disputed by the Carrier prior to the hearing on March 18, 2004." (Compl.¶ 15); *see* 45 U.S.C. § 153 First (i) ("[D]isputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes"). Under its limited scope of review, the Court cannot find that the NRAB proceedings were fundamentally unfair when the Organization had the ability to submit evidence of conferencing, Board precedent made clear that it considered conferencing a jurisdictional requirement and Board precedent indicated that the record should contain evidence of such conferencing. *See Pierce v. Commonwealth Edison Co.*, 1996 WL 374129, *4 (N.D.Ill.1996) (rejecting argument that "the arbitration panel exceeded their powers and refused to hear evidence material to the controversy").

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[6] The Organization makes several analogies to the judicial system's appellate process and concludes that requiring a party to plead jurisdiction in its opening submission would be "unheard of and unconscionable in any modern court proceeding." The Court disagrees with this conclusion and notes also that "parties that have chosen to remedy through arbitration rather than litigation should not expect the same procedures they find in the judicial area." *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir.1997); *see, e.g.*, Seventh Circuit Rule 28(a) (requiring a jurisdictional statement by appellant); Fed. R.App. P. 28(a)(4) (same).

The final element of the Organization's due process argument involves the belated nature in which the absence of conferencing was raised to the Board. But the Board regularly has considered such late challenges to their jurisdiction in the past.[7] In Award No. 4931, the Carrier Member at the Referee Hearing claimed the Board lacked jurisdiction to hear the case because a conference was not held. In dismissing the claims, the Board relied on precedent that "jurisdictional issues can be raised at any time." Fourth Division Award No. 4931(Sept. 22, 1994), at 2; *see* Second Division Award No. 12517 (May 3, 1993), at 3 ("With regard to the jurisdictional issue, even though the Organization argues that it comes late, this Board has uniformly held, on all Divisions, that issues of jurisdiction may be raised at any time"); Third Division Award No. 27575 (Sept. 29, 1988), at 3 ("The Board has over the years held the jurisdictional issues can be raised at any time"); Fourth Division Award No. 3203 (July 7, 1975), at 2 ("[I]t is universally recognized that such jurisdictional challenges may be presented at any stage of the proceeding"). Accordingly, the Board did not unfairly or arbitrarily consider the jurisdictional issue and due process was not violated.

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[7] A proposition familiar to this Court. *See* Fed.R.Civ.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that court lacks jurisdiction of the subject matter, the court shall dismiss the action"); *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (jurisdictional challenges may be raised at any stage of the proceedings by any party or the court itself).

Conclusion and Order

Construing the plain language of § 2 Second, and taking into consideration the history of the RLA, this Court holds that the parties are required to conference all disputes before they are referred to the NRAB. The provisions of §§ 2 Sixth and 3 First (i) permit the parties to set the terms and conditions for a conference to be held in their collective bargaining agreement, but those sections do not permit the parties to eliminate the conferencing step altogether. This Court also finds that the NRAB did not violate due process by refusing to consider evidence of conferencing outside of the on-property record. Wherefore, the Carrier's Motion to Dismiss is granted.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant-Appellee.

No. 06-2542.

Aug. 11, 2008.

537 F.3d 789

Before EASTERBROOK, Chief Judge, and POSNER, FLAUM, RIPPLE, KANNE, ROVNER, WOOD, EVANS, WILLIAMS, SYKES, and TINDER, Circuit Judges.

On April 23, 2008, plaintiff-appellant filed a petition for rehearing with a suggestion for rehearing en banc, and on May 16, 2008, defendant-appellee filed an answer to the petition. All of the judges on the panel voted to deny rehearing. No judge in regular active service has called for a vote on the suggestion for rehearing en banc. The petition is therefore Denied. Chief Judge Easterbrook concurs in the denial of rehearing en banc. His concurrence, in which Judge Posner joins, is attached.

EASTERBROOK, Chief Judge, with whom POSNER, Circuit Judge, joins, concurring in the denial of rehearing en banc.

Relying on *Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834 (7th Cir.1999), the panel held that decisions of the National Railroad Adjustment Board may be set aside on due-process grounds, notwithstanding *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978), and the omission of due process from the statutory grant of reviewing authority, 45 U.S.C. § 153 First (q). Three circuits have held after Sheehan that review of due-process arguments is forbidden. See *United Steelworkers v. Union R.R.*, 648 F.2d 905 (3d Cir.1981); *Kinross v. Utah Ry.*, 362 F.3d 658 (10th Cir.2004); *Henry v. Delta Air Lines*, 759 F.2d 870 (11th Cir.1985). Another has agreed in dictum. *Jones v. Seaboard System R.R.*, 783 F.2d 639, 642 n. 2 (6th Cir.1986). But four other circuits are on the panel's side of this conflict. See *Shafii v. PLC British Airways*, 22 F.3d 59 (2d Cir.1994); *Locomotive Engineers v. St. Louis Southwestern Ry.*, 757 F.2d 656 (5th Cir.1985); *Goff v. Dakota, Minnesota & Eastern R.R.*, 276 F.3d 992 (8th Cir.2002); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839 (9th Cir.1989). There is little to be gained from making the conflict 5-4 one way rather than 5-4 the other way. Only Congress or the Supreme Court can bring harmony, and neither institution seems much interested in doing so. (This conflict is 23 years old.)

Lurking behind the panel's decision is a question that the petition for rehearing en banc does not mention: whether the Board *did* offend the Constitution's due process clause. The litigants dispute whether papers filed with the Board must show that the parties attempted to work out their differences "on the property" (that is, through the carrier's auspices) before turning to the agency. No one doubts that informal dispute resolution is required. The novel question is whether a demonstration to that effect is a precondition to the Board's review. Our panel assumed (as the parties' briefs also did) that, if the Board adopted this requirement in the course of decision-that is, by adjudication rather than prospective rulemaking-then it violated the Constitution. The bulk of the panel's opinion is devoted to the question whether the Board has adopted a new requirement and thus acted unconstitutionally.

That assumption is questionable. Lawmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the parties but also to all similar cases. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). Administrative agencies no less than courts may adopt new rules by adjudication. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). Any suggestion that common-law developments are limited to substantive norms-that the Constitution does not tolerate changes that metaphorically "close the courthouse door"-would be hard to justify. Why may an agency or court change a substantive rule retroactively, and penalize conduct that seemed lawful when it occurred, but not change a procedural rule? Cf. *Landgraf v. USI Film Products*, 511 U.S. 244, 273-80, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (suggesting that retroactive procedural changes are easier to justify than retroactive substantive changes).

Distinguishing between substantive and procedural changes also would be difficult to square with decisions such as *Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). In Bell Atlantic the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier; in *Lampf Pleva* the Court revamped the statute of limitations for securities actions and dismissed hundreds of proceedings in which plaintiffs, relying on older law, had delayed in filing suit. And, when Congress tried to honor those reliance interests and allow the suits to continue, the Justices held *that* statute unconstitutional, on the ground that final judgments cannot be changed by legislative action. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995).

Because all parties to this case assumed that a change of law during the course of administrative adjudication offends the Constitution, it would be inappropriate for the court *en banc* to tackle that issue. The court will have time enough to address this subject when the question is squarely presented.

UNITED STATES CONSTITUTION
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code
Title 45. Railroads
Chapter 8. Railway Labor
Subchapter I. General

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

United States Code
Title 45. Railroads
Chapter 8. Railway Labor
Subchapter I. General Provisions

§ 152. General duties

* * *

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

United States Code
Title 45. Railroads
Chapter 8. Railway Labor
Subchapter I. General Provisions

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

* * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.1 General duties.

* * *

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151-162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.4 Jurisdiction.

(a) First Division. The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) Second Division. The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) Third Division. The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) Fourth Division. The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.5 Form of submission.

* * *

(d) *Position of employees.* Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

* * *

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

Award No. 26089
Docket No. 45601
05-1-02-1-U-2718

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

	(Brotherhood of Locomotive Engineers
PARTIES TO DISPUTE:	(
	(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of Engineer L.G. Glueck, for removal of Discipline, claiming all lost time (including time attending the investigation), fringe benefits, and clearing this notation of discipline from Engineer Glueck's record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On June 13, 2001, the Carrier reinstated the Claimant to service following his dismissal on January 19, 2001. Thus, as indicated above, the instant claim before the Board is a request for the removal of the Level 5 discipline previously assessed against the Claimant and payment for all lost time as a result of the discipline, including the time spent by the Claimant attending the investigation.

During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, the record before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by this Board. Second, the Carrier argued that pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that a conference indeed occurred rested with the moving party, the Organization. Third, based on the Carrier's assessment of the on-property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held, as statutorily required by the Railway Labor Act.

Thus, the Carrier emphasized that given the lack of any evidence contained in the on-property record establishing that a conference between the parties was indeed held in this matter, the Board has no jurisdiction to consider any of the remaining procedural or substantive issues associated with this claim. Based on a plethora of Board precedent in its favor, the

Carrier urges the Board to dismiss this claim in its entirety.

In response, the Organization first charged that the Carrier's raising of the jurisdictional objection at the time of the hearing before this Board was highly improper and completely contrary to its customary practice of raising such procedural objections immediately following the Organization's filing of the Notice of Intent. In light of the Carrier's timing of the objection, the Board should reject the Carrier's jurisdictional challenge and should afford this claim full consideration on the remaining procedural issues and contentions on the merits, the Organization submits.

Second, the Organization argues that during the additional day of hearing in this matter, and in its subsequent filing of written evidence in support of its position that this matter was discussed by the parties in the usual manner prior to the Notice filing, it demonstrated that the conference actually occurred, via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request. According to the Organization, the conference was held pursuant to the Agreed to Questions and Answers to UP/BLE Local Agreements June 1, 1996 (Attachment(a) Discipline Rule), which essentially provide that either the General Chairman or the Carrier's Labor Relations Officer may request that a discipline case be discussed in conference, and that the conference will be held within a specified time limit. It also suggests that conferences by telephone are accepted as proper by both these parties.

Third, in additional support of its position that the conference requirement was indeed satisfied in the instant case, the Organization tendered a copy of a

telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations, and a copy of the General Chairman's handwritten notes of the conference concerning the cases allegedly discussed on December 10, 2001, including the instant case. The Organization specifically argues that, as regards several of the other cases that were purportedly discussed on December 10, 2001, subsequent correspondence prepared by the Carrier concerning those cases (whether they be settlement letters or written submissions before this Board), did not contain any jurisdictional objections similar to the objection asserted here.

Thus, the Organization reasons that the Carrier's failure to raise any objection as regards a conference in those cases heard on the same date as this case gives credence to its current position that the Carrier's jurisdictional allegations here are specious and unfounded. As a result, the Organization urges the Board to reject the Carrier's jurisdictional challenge to this claim and to afford this claim full consideration on the merits.

The Board has carefully considered the passionate contentions of these parties on the jurisdictional issue now before the Board. Additionally, we closely studied the arbitral and judicial precedent cited by both parties in support of their respective positions. In light of the record actually before us, and the weight of Board precedent upholding the Carrier's position, we rule that the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied. The Board is thus without jurisdiction to consider this dispute under

these circumstances. The Board has no recourse but to dismiss the claim for lack of jurisdiction for the specific reasons that follow.

The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

The Board acknowledges that during the intervening months between the conclusion of the first day of hearing (when the Carrier first lodged its initial jurisdictional challenge) and the commencement of the second hearing date, as mentioned above, the Organization appears to have been able to locate records and notes which, on their face, may be regarded as supportive of its position that the conference occurred. However, the Board again emphasizes that because that evidence was not included in the record as developed during the on-property handling of this matter, these proofs cannot cure the statutory deficiency nor can those proofs resolve the Carrier's question of whether the conference requirement was discussed appropriately in the on-property handling of this matter. The Board's inability to consider evidence and arguments made for the first time to it at hearing has been upheld by numerous prior Awards, all of these Awards which have underscored this Board's function as an appellate tribunal, as opposed to one which is empowered to consider and rule on de novo evidence and arguments.

As this Referee stated in First Division Award 24400 involving these same parties:

> "We must emphasize that where new arguments and/or new evidence have been introduced by the parties which were not included in the Investigation or during the handling of this claim in the grievance process, they have not been considered in issuing the findings herein."

Moreover, this Referee additionally stated in First Division Award 24020 involving this Organization and Metra:

> "The third issue to be addressed before proceeding to the merits involves evidence offered by the Carrier after the matter was submitted to the Board. As both parties no doubt are well aware, the Board is limited in its consideration to evidence submitted by the parties during the handling of the dispute on the property. Given our appellate function, this new evidence presented for the first time to the Board will not be considered."

Thus, the Board stresses that the additional time granted to the parties in the form of a second hearing date before this Board was not for the purpose of obtaining new evidence or developing new arguments with respect to the threshold jurisdictional issue raised by the Carrier on the first hearing date. Instead, it was for the parties to make sure that the materials contained in the record disclosed evidence of the required conference. Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after the appeal to this Board would have been contrary to the procedural requirements contained in

NRAB Circular 1. Furthermore, the weight of arbitral precedent on this very issue has established that Boards must deem the evidentiary record closed once a Notice of Intent has been filed with the NRAB, we reiterate.

With respect to the specific jurisdictional objection raised here as to whether a conference was requested and held by the parties, this Board again emphasizes that it is constrained to answer that question based on the contents of the on-property record, as opposed to evidence procured outside of that record. Moreover, prior tribunals, as the Carrier has pointed out, have specifically found that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The absence of such proof in this case within the Organization's on-property record precludes the Board's consideration of the remaining factual or procedural issues. See First Division Awards 22428 and 18679; Second Division Award 12475; Third Division Awards 33916, 30821, 30260, 30114 and 27482; and Fourth Division Awards 4931 and 3203. See also First Division Awards 25994, 25991, 25476, 24400, 24020, and 23883; and several similar Awards of the Second, Third and Fourth Divisions. These cases mandate our sustaining the Carrier's objection, which we additionally conclude was timely raised (See First Division Award 24020; Second Division Award 12517; Third Division Awards 30954, 29909, 27575; and others), on grounds that the Organization's purported proof of conference was not included in the original record, and was not presented to the Board until after the Organization filed its Notice of Intent.

In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of March 2005.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

Award No. 26090
Docket No. 45722
05-1-02-1-U-2713

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE:

(Brotherhood of Locomotive Engineers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

> "Claim of Engineer B. L. South, for removal of Discipline, requesting immediate reinstatement, claiming full back pay, fringe benefits, vacation and seniority rights unimpaired, and clearing of this notation from Engineer South's record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 11, 2001, the Carrier assessed the discipline of Level 5 dismissal against the Claimant, under its UPGRADE Policy, for the Claimant's violation of several rules contained in the Carrier's GCOR. Thus, as specified above, the instant claim before this Board is a request for the Claimant's reinstatement, removal of the discipline, and payment for all lost time and benefits.

During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, the record before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by this Board. Second, the Carrier argued that pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that a conference indeed occurred rested with the moving party, the Organization. Third, based on the Carrier's assessment of the on-property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held, as statutorily required by the Railway Labor Act.

Thus, the Carrier emphasized that given the lack of any evidence contained in the on-property record establishing that a conference between the parties was indeed held in this matter, the Board has no jurisdiction to consider any of the remaining procedural or substantive issues associated with this claim. Based on a plethora of Board precedent in its favor, the

Carrier urges the Board to dismiss this claim in its entirety.

In response, the Organization first charged that the Carrier's raising of the jurisdictional objection at the time of the hearing before this Board was highly improper and completely contrary to its customary practice of raising such procedural objections immediately following the Organization's filing of the Notice of Intent. In light of the Carrier's timing of the objection, the Board should reject the Carrier's jurisdictional challenge and should afford this claim full consideration on the remaining procedural issues and contentions on the merits, the Organization submits.

Second, the Organization argues that during the additional day of hearing in this matter, and in its subsequent filing of written evidence in support of its position that this matter was discussed by the parties in the usual manner prior to the Notice filing, it demonstrated that the conference actually occurred, via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request. According to the Organization, the conference was held pursuant to the Agreed to Questions and Answers to UP/BLE Local Agreements June 1, 1996 (Attachment(a) Discipline Rule), which essentially provide that either the General Chairman or the Carrier's Labor Relations Officer may request that a discipline case be discussed in conference, and that the conference will be held within a specified time limit. It also suggests that conferences by telephone are accepted as proper by both these parties.

Third, in additional support of its position that the conference requirement was indeed satisfied in the instant case, the Organization tendered a copy of a

telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations, and a copy of the General Chairman's handwritten notes of the conference concerning the cases allegedly discussed on December 10, 2001, including the instant case. The Organization specifically argues that, as regards several of the other cases that were purportedly discussed on December 10, 2001, subsequent correspondence prepared by the Carrier concerning those cases (whether they be settlement letters or written submissions before this Board), did not contain any jurisdictional objections similar to the objection asserted here.

Thus, the Organization reasons that the Carrier's failure to raise any objection as regards a conference in those cases heard on the same date as this case gives credence to its current position that the Carrier's jurisdictional allegations here are specious and unfounded. As a result, the Organization urges the Board to reject the Carrier's jurisdictional challenge to this claim and to afford this claim full consideration on the merits.

The Board has carefully considered the passionate contentions of these parties on the jurisdictional issue now before the Board. Additionally, we closely studied the arbitral and judicial precedent cited by both parties in support of their respective positions. In light of the record actually before us, and the weight of Board precedent upholding the Carrier's position, we rule that the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied. The Board is thus without jurisdiction to consider this dispute under

these circumstances. The Board has no recourse but to dismiss the claim for lack of jurisdiction for the specific reasons that follow.

The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

The Board acknowledges that during the intervening months between the conclusion of the first day of hearing (when the Carrier first lodged its initial jurisdictional challenge) and the commencement of the second hearing date, as mentioned above, the Organization appears to have been able to locate records and notes which, on their face, may be regarded as supportive of its position that the conference occurred. However, the Board again emphasizes that because that evidence was not included in the record as developed during the on-property handling of this matter, these proofs cannot cure the statutory deficiency nor can those proofs resolve the Carrier's question of whether the conference requirement was discussed appropriately in the on-property handling of this matter. The Board's inability to consider evidence and arguments made for the first time to it at hearing has been upheld by numerous prior Awards, all of these Awards which have underscored this Board's function as an appellate tribunal, as opposed to one which is empowered to consider and rule on de novo evidence and arguments.

As this Referee stated in First Division Award 24400 involving these same parties:

> "We must emphasize that where new arguments and/or new evidence have been introduced by the parties which were not included in the Investigation or during the handling of this claim in the grievance process, they have not been considered in issuing the findings herein."

Moreover, this Referee additionally stated in First Division Award 24020 involving this Organization and Metra:

> "The third issue to be addressed before proceeding to the merits involves evidence offered by the Carrier after the matter was submitted to the Board. As both parties no doubt are well aware, the Board is limited in its consideration to evidence submitted by the parties during the handling of the dispute on the property. Given our appellate function, this new evidence presented for the first time to the Board will not be considered."

Thus, the Board stresses that the additional time granted to the parties in the form of a second hearing date before this Board was not for the purpose of obtaining new evidence or developing new arguments with respect to the threshold jurisdictional issue raised by the Carrier on the first hearing date. Instead, it was for the parties to make sure that the materials contained in the record disclosed evidence of the required conference. Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after the appeal to this Board would have been contrary to the procedural requirements contained in

NRAB Circular 1. Furthermore, the weight of arbitral precedent on this very issue has established that Boards must deem the evidentiary record closed once a Notice of Intent has been filed with the NRAB, we reiterate.

With respect to the specific jurisdictional objection raised here as to whether a conference was requested and held by the parties, this Board again emphasizes that it is constrained to answer that question based on the contents of the on-property record, as opposed to evidence procured outside of that record. Moreover, prior tribunals, as the Carrier has pointed out, have specifically found that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The absence of such proof in this case within the Organization's on-property record precludes the Board's consideration of the remaining factual or procedural issues. See First Division Awards 22428 and 18679; Second Division Award 12475; Third Division Awards 33916, 30821, 30260, 30114 and 27482; and Fourth Division Awards 4931 and 3203. See also First Division Awards 25994, 25991, 25476, 24400, 24020, and 23883; and several similar Awards of the Second, Third and Fourth Divisions. These cases mandate our sustaining the Carrier's objection, which we additionally conclude was timely raised (See First Division Award 24020; Second Division Award 12517; Third Division Awards 30954, 29909, 27575; and others), on grounds that the Organization's purported proof of conference was not included in the original record, and was not presented to the Board until after the Organization filed its Notice of Intent.

In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of March 2005.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

Award No. 26092
Docket No. 45891
05-1-02-1-U-3151

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE:

(Brotherhood of Locomotive Engineers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

> "Claim of Engineer R. E. Whatley, for removal of Discipline, requesting immediate reinstatement, claiming full back pay, fringe benefits, vacation and seniority rights unimpaired, and clearing this notation of discipline from Engineer Whatley's record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant dispute before this Board involves a contention by the Organization that the matter before it regarding this Claimant was improperly handled by the Carrier as a disciplinary issue instead of a medical situation. Central to the Organization's claim is an assertion that the Carrier violated the 10-day rule for filing charges, as set forth in Section 3 of the parties System Agreement Discipline Rule.

During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, the record before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by this Board. Second, the Carrier argued that pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that a conference indeed occurred rested with the moving party, the Organization. Third, based on the Carrier's assessment of the on-property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held, as statutorily required by the Railway Labor Act.

Thus, the Carrier emphasized that given the lack of any evidence contained in the on-property record establishing that a conference between the parties was indeed held in this matter, the Board has no jurisdiction to consider any of the remaining procedural or substantive issues associated with this claim. Based on a plethora of Board precedent in its favor, the

Carrier urges the Board to dismiss this claim in its entirety.

In response, the Organization first charged that the Carrier's raising of the jurisdictional objection at the time of the hearing before this Board was highly improper and completely contrary to its customary practice of raising such procedural objections immediately following the Organization's filing of the Notice of Intent. In light of the Carrier's timing of the objection, the Board should reject the Carrier's jurisdictional challenge and should afford this claim full consideration on the remaining procedural issues and contentions on the merits, the Organization submits.

Second, the Organization argues that during the additional day of hearing in this matter, and in its subsequent filing of written evidence in support of its position that this matter was discussed by the parties in the usual manner prior to the Notice filing, it demonstrated that the conference actually occurred, via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request. According to the Organization, the conference was held pursuant to the Agreed to Questions and Answers to UP/BLE Local Agreements June 1, 1996 (Attachment(a) Discipline Rule), which essentially provide that either the General Chairman or the Carrier's Labor Relations Officer may request that a discipline case be discussed in conference, and that the conference will be held within a specified time limit. It also suggests that conferences by telephone are accepted as proper by both these parties.

Third, in additional support of its position that the conference requirement was indeed satisfied in the instant case, the Organization tendered a copy of a

telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations, and a copy of the General Chairman's handwritten notes of the conference concerning the cases allegedly discussed on December 10, 2001, including the instant case. The Organization specifically argues that, as regards several of the other cases that were purportedly discussed on December 10, 2001, subsequent correspondence prepared by the Carrier concerning those cases (whether they be settlement letters or written submissions before this Board), did not contain any jurisdictional objections similar to the objection asserted here.

Thus, the Organization reasons that the Carrier's failure to raise any objection as regards a conference in those cases heard on the same date as this case gives credence to its current position that the Carrier's jurisdictional allegations here are specious and unfounded. As a result, the Organization urges the Board to reject the Carrier's jurisdictional challenge to this claim and to afford this claim full consideration on the merits.

The Board has carefully considered the passionate contentions of these parties on the jurisdictional issue now before the Board. Additionally, we closely studied the arbitral and judicial precedent cited by both parties in support of their respective positions. In light of the record actually before us, and the weight of Board precedent upholding the Carrier's position, we rule that the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied. The Board is thus without jurisdiction to consider this dispute under

these circumstances. The Board has no recourse but to dismiss the claim for lack of jurisdiction for the specific reasons that follow.

The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

The Board acknowledges that during the intervening months between the conclusion of the first day of hearing (when the Carrier first lodged its initial jurisdictional challenge) and the commencement of the second hearing date, as mentioned above, the Organization appears to have been able to locate records and notes which, on their face, may be regarded as supportive of its position that the conference occurred. However, the Board again emphasizes that because that evidence was not included in the record as developed during the on-property handling of this matter, these proofs cannot cure the statutory deficiency nor can those proofs resolve the Carrier's question of whether the conference requirement was discussed appropriately in the on-property handling of this matter. The Board's inability to consider evidence and arguments made for the first time to it at hearing has been upheld by numerous prior Awards, all of these Awards which have underscored this Board's function as an appellate tribunal, as opposed to one which is empowered to consider and rule on de novo evidence and arguments.

As this Referee stated in First Division Award 24400 involving these same parties:

> "We must emphasize that where new arguments and/or new evidence have been introduced by the parties which were not included in the Investigation or during the handling of this claim in the grievance process, they have not been considered in issuing the findings herein."

Moreover, this Referee additionally stated in First Division Award 24020 involving this Organization and Metra:

> "The third issue to be addressed before proceeding to the merits involves evidence offered by the Carrier after the matter was submitted to the Board. As both parties no doubt are well aware, the Board is limited in its consideration to evidence submitted by the parties during the handling of the dispute on the property. Given our appellate function, this new evidence presented for the first time to the Board will not be considered."

Thus, the Board stresses that the additional time granted to the parties in the form of a second hearing date before this Board was not for the purpose of obtaining new evidence or developing new arguments with respect to the threshold jurisdictional issue raised by the Carrier on the first hearing date. Instead, it was for the parties to make sure that the materials contained in the record disclosed evidence of the required conference. Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after the appeal to this Board would have been contrary to the procedural requirements contained in

NRAB Circular 1. Furthermore, the weight of arbitral precedent on this very issue has established that Boards must deem the evidentiary record closed once a Notice of Intent has been filed with the NRAB, we reiterate.

With respect to the specific jurisdictional objection raised here as to whether a conference was requested and held by the parties, this Board again emphasizes that it is constrained to answer that question based on the contents of the on-property record, as opposed to evidence procured outside of that record. Moreover, prior tribunals, as the Carrier has pointed out, have specifically found that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The absence of such proof in this case within the Organization's on-property record precludes the Board's consideration of the remaining factual or procedural issues. See First Division Awards 22428 and 18679; Second Division Award 12475; Third Division Awards 33916, 30821, 30260, 30114 and 27482; and Fourth Division Awards 4931 and 3203. See also First Division Awards 25994, 25991, 25476, 24400, 24020, and 23883; and several similar Awards of the Second, Third and Fourth Divisions. These cases mandate our sustaining the Carrier's objection, which we additionally conclude was timely raised (See First Division Award 24020; Second Division Award 12517; Third Division Awards 30954, 29909, 27575; and others), on grounds that the Organization's purported proof of conference was not included in the original record, and was not presented to the Board until after the Organization filed its Notice of Intent.

In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of March 2005.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

Award No. 26093
Docket No. 45939
05-1-03-1-U-3179

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE:

(Brotherhood of Locomotive Engineers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

> "Claims of Engineer C. C. Fosha, for removal of Discipline, requesting immediate reinstatement, claiming full back pay, fringe benefits, vacation and seniority rights unimpaired, and clearing this notation of discipline from Engineer Fosha's record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 9, 2002, the Carrier assessed the discipline of Level 5 dismissal against the Claimant, under its UPGRADE Policy, for the claimant's violation of various rules contained in the Carrier's GCOR. Thus, as specified above, the instant claim before the Board is a request for the Claimant's reinstatement, removal of the discipline, and payment for all lost time and benefits.

During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, the record before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by this Board. Second, the Carrier argued that pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that a conference indeed occurred rested with the moving party, the Organization. Third, based on the Carrier's assessment of the on-property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held, as statutorily required by the Railway Labor Act.

Thus, the Carrier emphasized that given the lack of any evidence contained in the on-property record establishing that a conference between the parties was indeed held in this matter, the Board has no jurisdiction to consider any of the remaining procedural or substantive issues associated with this claim. Based on a plethora of Board precedent in its favor, the

Carrier urges the Board to dismiss this claim in its entirety.

In response, the Organization first charged that the Carrier's raising of the jurisdictional objection at the time of the hearing before this Board was highly improper and completely contrary to its customary practice of raising such procedural objections immediately following the Organization's filing of the Notice of Intent. In light of the Carrier's timing of the objection, the Board should reject the Carrier's jurisdictional challenge and should afford this claim full consideration on the remaining procedural issues and contentions on the merits, the Organization submits.

Second, the Organization argues that during the additional day of hearing in this matter, and in its subsequent filing of written evidence in support of its position that this matter was discussed by the parties in the usual manner prior to the Notice filing, it demonstrated that the conference actually occurred, via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request. According to the Organization, the conference was held pursuant to the Agreed to Questions and Answers to UP/BLE Local Agreements June 1, 1996 (Attachment(a) Discipline Rule), which essentially provide that either the General Chairman or the Carrier's Labor Relations Officer may request that a discipline case be discussed in conference, and that the conference will be held within a specified time limit. It also suggests that conferences by telephone are accepted as proper by both these parties.

Third, in additional support of its position that the conference requirement was indeed satisfied in the instant case, the Organization tendered a copy of a

telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations, and a copy of the General Chairman's handwritten notes of the conference concerning the cases allegedly discussed on December 10, 2001, including the instant case. The Organization specifically argues that, as regards several of the other cases that were purportedly discussed on December 10, 2001, subsequent correspondence prepared by the Carrier concerning those cases (whether they be settlement letters or written submissions before this Board), did not contain any jurisdictional objections similar to the objection asserted here.

Thus, the Organization reasons that the Carrier's failure to raise any objection as regards a conference in those cases heard on the same date as this case gives credence to its current position that the Carrier's jurisdictional allegations here are specious and unfounded. As a result, the Organization urges the Board to reject the Carrier's jurisdictional challenge to this claim and to afford this claim full consideration on the merits.

The Board has carefully considered the passionate contentions of these parties on the jurisdictional issue now before the Board. Additionally, we closely studied the arbitral and judicial precedent cited by both parties in support of their respective positions. In light of the record actually before us, and the weight of Board precedent upholding the Carrier's position, we rule that the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied. The Board is thus without jurisdiction to consider this dispute under

these circumstances. The Board has no recourse but to dismiss the claim for lack of jurisdiction for the specific reasons that follow.

The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

The Board acknowledges that during the intervening months between the conclusion of the first day of hearing (when the Carrier first lodged its initial jurisdictional challenge) and the commencement of the second hearing date, as mentioned above, the Organization appears to have been able to locate records and notes which, on their face, may be regarded as supportive of its position that the conference occurred. However, the Board again emphasizes that because that evidence was not included in the record as developed during the on-property handling of this matter, these proofs cannot cure the statutory deficiency nor can those proofs resolve the Carrier's question of whether the conference requirement was discussed appropriately in the on-property handling of this matter. The Board's inability to consider evidence and arguments made for the first time to it at hearing has been upheld by numerous prior Awards, all of these Awards which have underscored this Board's function as an appellate tribunal, as opposed to one which is empowered to consider and rule on de novo evidence and arguments.

As this Referee stated in First Division Award 24400 involving these same parties:

> "We must emphasize that where new arguments and/or new evidence have been introduced by the parties which were not included in the Investigation or during the handling of this claim in the grievance process, they have not been considered in issuing the findings herein."

Moreover, this Referee additionally stated in First Division Award 24020 involving this Organization and Metra:

> "The third issue to be addressed before proceeding to the merits involves evidence offered by the Carrier after the matter was submitted to the Board. As both parties no doubt are well aware, the Board is limited in its consideration to evidence submitted by the parties during the handling of the dispute on the property. Given our appellate function, this new evidence presented for the first time to the Board will not be considered."

Thus, the Board stresses that the additional time granted to the parties in the form of a second hearing date before this Board was not for the purpose of obtaining new evidence or developing new arguments with respect to the threshold jurisdictional issue raised by the Carrier on the first hearing date. Instead, it was for the parties to make sure that the materials contained in the record disclosed evidence of the required conference. Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after the appeal to this Board would have been contrary to the procedural requirements contained in

NRAB Circular 1. Furthermore, the weight of arbitral precedent on this very issue has established that Boards must deem the evidentiary record closed once a Notice of Intent has been filed with the NRAB, we reiterate.

With respect to the specific jurisdictional objection raised here as to whether a conference was requested and held by the parties, this Board again emphasizes that it is constrained to answer that question based on the contents of the on-property record, as opposed to evidence procured outside of that record. Moreover, prior tribunals, as the Carrier has pointed out, have specifically found that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The absence of such proof in this case within the Organization's on-property record precludes the Board's consideration of the remaining factual or procedural issues. See First Division Awards 22428 and 18679; Second Division Award 12475; Third Division Awards 33916, 30821, 30260, 30114 and 27482; and Fourth Division Awards 4931 and 3203. See also First Division Awards 25994, 25991, 25476, 24400, 24020, and 23883; and several similar Awards of the Second, Third and Fourth Divisions. These cases mandate our sustaining the Carrier's objection, which we additionally conclude was timely raised (See First Division Award 24020; Second Division Award 12517; Third Division Awards 30954, 29909, 27575; and others), on grounds that the Organization's purported proof of conference was not included in the original record, and was not presented to the Board until after the Organization filed its Notice of Intent.

In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of March 2005.

Form 1 NATIONAL RAILROAD
ADJUSTMENT BOARD
FIRST DIVISION

Award No. 26094
Docket No. 45954
05-1-03-1-U-3190

The First Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE:
(Brotherhood of Locomotive Engineers
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

> "Claim of Engineer M. L. Pope, for removal of Discipline, requesting immediate reinstatement, claiming full back pay, fringe benefits, vacation and seniority rights, unimpaired, and clearing this notation of discipline from Engineer Pope's record."

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant dispute before this Board involves the Claimant's positive drug test result ascertained through FRA random drug testing conducted on May 22, 2000, and his subsequent Level 5 dismissal under the Carrier's UPGRADE Policy. Despite the fact that this was the Claimant's second positive test result, the Organization argued that circumstances were unusual and the dismissal was not warranted.

During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, the record before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by this Board. Second, the Carrier argued that pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that a conference indeed occurred rested with the moving party, the Organization. Third, based on the Carrier's assessment of the on-property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held, as statutorily required by the Railway Labor Act.

Thus, the Carrier emphasized that given the lack of any evidence contained in the on-property record establishing that a conference between the parties was indeed held in this matter, the Board has no jurisdiction to consider any of the remaining procedural or substantive issues associated with this claim. Based on a plethora of Board precedent in its favor, the

Carrier urges the Board to dismiss this claim in its entirety.

In response, the Organization first charged that the Carrier's raising of the jurisdictional objection at the time of the hearing before this Board was highly improper and completely contrary to its customary practice of raising such procedural objections immediately following the Organization's filing of the Notice of Intent. In light of the Carrier's timing of the objection, the Board should reject the Carrier's jurisdictional challenge and should afford this claim full consideration on the remaining procedural issues and contentions on the merits, the Organization submits.

Second, the Organization argues that during the additional day of hearing in this matter, and in its subsequent filing of written evidence in support of its position that this matter was discussed by the parties in the usual manner prior to the Notice filing, it demonstrated that the conference actually occurred, via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request. According to the Organization, the conference was held pursuant to the Agreed to Questions and Answers to UP/BLE Local Agreements June 1, 1996 (Attachment(a) Discipline Rule), which essentially provide that either the General Chairman or the Carrier's Labor Relations Officer may request that a discipline case be discussed in conference, and that the conference will be held within a specified time limit. It also suggests that conferences by telephone are accepted as proper by both these parties.

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telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations, and a copy of the General Chairman's handwritten notes of the conference concerning the cases allegedly discussed on December 10, 2001, including the instant case. The Organization specifically argues that, as regards several of the other cases that were purportedly discussed on December 10, 2001, subsequent correspondence prepared by the Carrier concerning those cases (whether they be settlement letters or written submissions before this Board), did not contain any jurisdictional objections similar to the objection asserted here.

Thus, the Organization reasons that the Carrier's failure to raise any objection as regards a conference in those cases heard on the same date as this case gives credence to its current position that the Carrier's jurisdictional allegations here are specious and unfounded. As a result, the Organization urges the Board to reject the Carrier's jurisdictional challenge to this claim and to afford this claim full consideration on the merits.

The Board has carefully considered the passionate contentions of these parties on the jurisdictional issue now before the Board. Additionally, we closely studied the arbitral and judicial precedent cited by both parties in support of their respective positions. In light of the record actually before us, and the weight of Board precedent upholding the Carrier's position, we rule that the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied. The Board is thus without jurisdiction to consider this dispute under

these circumstances. The Board has no recourse but to dismiss the claim for lack of jurisdiction for the specific reasons that follow.

The Board emphasizes that all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal, we stress.

The Board acknowledges that during the intervening months between the conclusion of the first day of hearing (when the Carrier first lodged its initial jurisdictional challenge) and the commencement of the second hearing date, as mentioned above, the Organization appears to have been able to locate records and notes which, on their face, may be regarded as supportive of its position that the conference occurred. However, the Board again emphasizes that because that evidence was not included in the record as developed during the on-property handling of this matter, these proofs cannot cure the statutory deficiency nor can those proofs resolve the Carrier's question of whether the conference requirement was discussed appropriately in the on-property handling of this matter. The Board's inability to consider evidence and arguments made for the first time to it at hearing has been upheld by numerous prior Awards, all of these Awards which have underscored this Board's function as an appellate tribunal, as opposed to one which is empowered to consider and rule on de novo evidence and arguments.

As this Referee stated in First Division Award 24400 involving these same parties:

> "We must emphasize that where new arguments and/or new evidence have been introduced by the parties which were not included in the Investigation or during the handling of this claim in the grievance process, they have not been considered in issuing the findings herein."

Moreover, this Referee additionally stated in First Division Award 24020 involving this Organization and Metra:

> "The third issue to be addressed before proceeding to the merits involves evidence offered by the Carrier after the matter was submitted to the Board. As both parties no doubt are well aware, the Board is limited in its consideration to evidence submitted by the parties during the handling of the dispute on the property. Given our appellate function, this new evidence presented for the first time to the Board will not be considered."

Thus, the Board stresses that the additional time granted to the parties in the form of a second hearing date before this Board was not for the purpose of obtaining new evidence or developing new arguments with respect to the threshold jurisdictional issue raised by the Carrier on the first hearing date. Instead, it was for the parties to make sure that the materials contained in the record disclosed evidence of the required conference. Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after the appeal to this Board would have been contrary to the procedural requirements contained in

NRAB Circular 1. Furthermore, the weight of arbitral precedent on this very issue has established that Boards must deem the evidentiary record closed once a Notice of Intent has been filed with the NRAB, we reiterate.

With respect to the specific jurisdictional objection raised here as to whether a conference was requested and held by the parties, this Board again emphasizes that it is constrained to answer that question based on the contents of the on-property record, as opposed to evidence procured outside of that record. Moreover, prior tribunals, as the Carrier has pointed out, have specifically found that "the requirement that proof of conference exist within the on-property record is a statutory prerequisite to this Board's jurisdiction." The absence of such proof in this case within the Organization's on-property record precludes the Board's consideration of the remaining factual or procedural issues. See First Division Awards 22428 and 18679; Second Division Award 12475; Third Division Awards 33916, 30821, 30260, 30114 and 27482; and Fourth Division Awards 4931 and 3203. See also First Division Awards 25994, 25991, 25476, 24400, 24020, and 23883; and several similar Awards of the Second, Third and Fourth Divisions. These cases mandate our sustaining the Carrier's objection, which we additionally conclude was timely raised (See First Division Award 24020; Second Division Award 12517; Third Division Awards 30954, 29909, 27575; and others), on grounds that the Organization's purported proof of conference was not included in the original record, and was not presented to the Board until after the Organization filed its Notice of Intent.

In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim. Therefore, this claim must be dismissed.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 15th day of March 2005.

NATIONAL RAILROAD ADJUSTMENT BOARD FIRST DIVISION

LABOR MEMBERS' DISSENT

Awards Nos. 26089, 26090, 26092, 26093 & 26094
Dockets Nos. 45601, 45722, 45891, 45939 & 45954
Referee Elliot H. Goldstein

The Majority has committed a grave injustice to the Claimants in these Dockets by declining jurisdiction of these claims on the basis of their mistaken view of the Organization's burden of proof. In each of these Dockets, the claims were handled in the usual and customary manner on the property, including conference (which is *not* required by the applicable labor agreement), and in each Docket the Carrier's Submission took no exception to the Board's jurisdiction on that count.

Shortly before these Dockets were first heard before the Referee, a Carrier Member of the Board reviewed the Docket files and theorized that there was no evidence contained within any of them that would serve to show that a conference was ever held in any of the cases. At the start of the hearings, he filed a motion to dismiss these Dockets on the basis that, allegedly, none of them had been conferenced. The Dockets were continued to a later date for further consideration of this issue. When the Division again met, the Employees furnished evidence to show that the cases had all been conferenced, even though the relevant Collective Bargaining Agreement does not require such as part of the *usual manner* of handling required by Section 3, *First* (i) of the RLA, and pointed to evidence already present in several of these Dockets already showing that conferences had taken place in those cases.

Reduced to its essentials, the Majority has now concluded that the Division cannot consider any of the evidence showing that a conference was held if that evidence was not part of the property handling at the time the record of the case was closed with the service of a Notice of Intent. In support of this position, the Majority cites to a number of Awards speaking to the general principle that the Board cannot consider new evidence raised for the first time before the Board. This overly simplistic and formalistic application of this principle places form over function and represents a fundamental denial of process to the Employees.

New evidence is disallowed by the Board which it represents an attempt to blindside one party or the other. It is a function of the Board's appellate nature, which limits it to deciding cases based on the record developed on the property. This situation is vastly different in these Dockets, however, because the conference issue was not raised until long after the records had been closed. The *Parties* proceeded with the cases to the Board *satisfied* that the procedural prerequisites had been met, and the conference issue arose solely because a Carrier Member decided to put the Docket files under a microscope the night before the initial Referee Hearing and interpret the record out of context. An equally well settled principle governing the Board's deliberations is that of constructive waiver, where parties are deemed to waive issues that are not raised when the opportunity to do so first presents itself, especially when the delay in raising the issue serves to deny the other party a reasonable opportunity to join, and defend, the issue.

But that is precisely what the Majority has allowed to happen here, by allowing the Carrier (through a Board Member proxy) to raise a jurisdictional issue for the *first time* at the *last possible minute* while limiting the Organization to the record developed on the property, leaving the Employees defenseless and the Claimants without a remedy, a fundamental and egregious denial of process.

This is the kind of gamesmanship that breeds contempt for the minor dispute process, and the Majority should be ashamed to use it to shield the Carrier from the merits of these cases.

/s/ Richard K. Radek
Richard K. Radek, Labor Member

/s/ Marcus J. Ruef
Marcus J. Ruef, Labor Member

OPPOSITION BRIEF

No. 08-604

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN, GENERAL COMMITTEE OF
ADJUSTMENT, CENTRAL REGION,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. Does the use of procedural due process as a ground of review in this case differ in any fundamental way from statutory review when the NRAB panel "failed to confine or conform itself to" its proper jurisdiction by adopting a door-closing procedural rule that is not in the Railway Labor Act or Circular One or the relevant collective bargaining agreement?

2. Whether, in the absence of any statement that it was doing so, Congress expressly barred the federal courts from their original equity jurisdiction to hear cases alleging that a governmental agency, the National Railway Adjustment Board, has invaded constitutional rights and for the court to restrain such an invasion?

3. Can the NRAB panels adopt new rules at all when the NRAB decisions have no binding effect as precedents?

CORPORATE DISCLOSURE STATEMENT

Respondent is the General Committee of Adjustment, Central Region, for the Brotherhood of Locomotive Engineers and Trainmen, a division of the Rail Conference of the International Brotherhood of Teamsters. It is a labor organization and has issued no stock.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Introduction 1

Counterstatement of the Case 1

Reasons for Denying the Petition 6

- I) The alleged circuit split is illusory and has no practical effect 6
  - A. The use of "procedural due process" as a ground for reviewing an NRAB decision under the Fifth Amendment is not significantly different from the review provided by the RLA 7
  - B. The availability of constitutional review of NRAB proceedings has had a negligible effect on labor-management relations in affected industries 15
- II) The NRAB cannot engage in adjudicatory rulemaking 16
- III) Congress has never clearly eliminated the jurisdiction of Art. III courts to hear constitutional claims arising out of NRAB proceedings 19
- IV) None of the issues presented are properly before the Court 20

TABLE OF CONTENTS – Continued

Page

A. Petitioner has waived the issue of Art. III jurisdiction to hear constitutional due process claims arising out of NRAB proceedings.................................. 20

B. The issue of whether the NRAB engaged in permissible adjudicatory rulemaking is not properly before the Court 21

Conclusion.. 22

TABLE OF AUTHORITIES

Page

CASES

Bhd. of Locomotive Eng'ring v. Atchison, Topeka and Santa Fe R.R., 768 F.2d 914 (7th Cir. 1985) 8, 10

Califano v. Sanders, 430 U.S. 99 (1977) 20, 21

Chicago Rock Island and Pac. R.R. v. Wells, 498 F.2d 913 (7th Cir. 1974) 8

Elmore v. Chicago & Ill. Midland Ry., 782 F.2d 94 (7th Cir. 1986) 2, 19

Hall St. Asscs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) 8

Henry v. Delta Airlines, 759 F.2d 870 (11th Cir. 1985) 14, 15

Hill v. Norfolk & W. Ry., 814 F.2d 1192 (7th Cir. 1987) 8

Kinross v. Utah Ry. Co., 362 F.3d 658 (10th Cir. 2004) 8, 12

Johns-Manville Sales v. Intern. Ass'n of Machinists, 621 F.2d 756 (5th Cir. 1980) 15

Johnson v. Robinson, 415 U.S. 361 (1974) 20

Jones v. St. Louis-San Francisco Ry. Co., 728 F.2d 257 (6th Cir. 1984) 11

Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) 13

McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991) 20

TABLE OF AUTHORITIES – Continued

Page

Morrissey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) 13

SEC v. Chenery Corp., 332 U.S. 194 (1947) 3, 17

Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89 (1978) 12, 14, 20

United Steel Workers of America Loc. 913 v. Union R.R. Com., 648 F.2d 905 (3rd Cir. 1981) 10

Youkim v. Miller, 425 U.S. 231 (1976) 21

STATUTES AND REGULATIONS

45 U.S.C. 153 First (q) .... *passim*

29 C.F.R. Part 301 1

OTHER AUTHORITIES

Carlton Snow, *An Arbitrator's Use of Precedent*, 94 Dick. L. Rev. 665 (1990) 18

Frank Elkouri, Edna Asper Elkouri, and Alan Miles Ruben, *How Arbitration Works*, BNA Books (6th ed., 2003) 2

INTRODUCTION

At first glance, this case seems ripe for review. There is a 5-4 split across the circuits, and as noted by *amici*, thousands of arbitration cases are affected by the split. *Amici* Br. at 7. The Court should not add this case to its docket, however, because whichever side of the split it came down on, there would be no practical effect. The grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself. While *amici* list the thousands of grievances and arbitrations affected by this split, they do not point out how few cases have actually sought constitutional review of an arbitration under the Railway Labor Act. The Court should decline to take this case because it could only result in an empty ruling.

◆

COUNTERSTATEMENT OF THE CASE

Statutory Background

The Railway Labor Act ["RLA"] predates the National Labor Relations Act and controls labor-management relations in the rail and air industries. At the time the RLA was enacted, Congress authorized a one time only rulemaking, resulting in "Circular One." The rules of "Circular One" are codified in 29 C.F.R. Part 301. There are no other applicable regulations or rules in existence.

Congress established the National Railway Adjustment Board ["NRAB"] as an "appellate body" consisting of a Carrier Representative, a labor representative, and a Neutral Member who is employed and paid by the United States.[1] In this appellate function, the NRAB hears and decides grievances arising under the collective bargaining agreements of carriers and labor organizations.[2] With respect to each grievance, the parties present their evidence in hearings "on the record," in a manner set out in the parties' collective bargaining agreements. In the grievances resulting in the instant case, the procedures for these hearings were set out in detail in the so-called "Disciplinary Rule," which is a collective bargaining agreement between Petitioner and the Respondent.

The purpose of the NRAB is solely to apply the collective bargaining agreement ["CBA"]. It does not administer or enforce any provision of federal law – although is itself a creature thereof and subject to the Fifth Amendment. *See, e.g., Elmore v. Chicago & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986). In this respect, it is different from the NLRB or the SEC in that it does not have an agency "head," or "general counsel" and it does not create a body of precedent under federal law. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

---

[1] While current funding levels inhibit the timeliness of resolutions in the rail industry, the obligation of the government to pay for arbitrators is related to the limitations on the right of workers to strike.

[2] *See generally,* Frank Elkouri, Edna Asper Elkouri, and Alan Miles Ruben, *How Arbitration Works*, 164-67, BNA Books (6th ed., 2003).

The NRAB is essentially a system for the appointment and payment of Neutral Members who are otherwise like *ad hoc* private labor arbitrators for the enforcement of private labor agreements. Like other arbitrations, the decisions of NRAB panels have no binding effect as precedent. They only recently have begun to be digitally preserved, and there is limited access to these records. Their value as precedent is further limited by the fact that they interpret and apply many different CBA's. In any case, there is no decision of any RLA panel other than the one at hand which applies the rule that written "evidence" of the conferencing between the union and the railroad must be presented with other "evidence" as to the merits of the grievance itself.

In the cases at hand, the CBA is silent as to how or in what manner conferencing shall occur. The CBA has no requirement that evidence of conferencing must be presented to the NRAB panel at all, much less in any particular manner. While the Brotherhood of Locomotives Engineers and Trainment ("BLET") accepts that conferencing must occur in some form, the RLA and Circular One leave it to the parties to decide how the conferencing must occur. While the RLA and Circular One discuss how the evidence as to the merits of the case should be presented, they, along with the CBA, are silent as to how the fact that conferencing occurred can be shown.

Conferencing can be thought of as a step in the grievance process. Like many non-RLA covered industries, certain steps take place as informal and oral communications between the railroad and the union. If this communication does not resolve the issue, then a subsequent step is triggered – in this case, the next step is an appeal to the NRAB. If conferencing has not occurred, then the case is not ripe for hearing and must be "conferenced" before it can be submitted to the NRAB.

Proceedings Below

The CBA does not require conferencing, or even refer to it. However, as to all five of the discharge cases in this matter, the BLET and Union Pacific did in fact conference the grievances. 7th Cir. Dec. at 20. The BLET prepared the submissions to the NRAB, and Union Pacific substantively responded. It was only after the case had begun, "on the eve of arbitration," that Union Pacific raised the procedural objection that the BLET had not submitted any "evidence" of the conferencing. 7th Cir. Dec. at 20. Surprised by this procedural objection by a panel member as the case was to commence, rather than in formal filings, the BLET representative asked for an adjournment and returned with documentation that the parties had met and conferenced. 7th Cir. Dec. at 21-22.

The panel – the Neutral Member and the Carrier Representative – refused to accept this evidence, though the Neutral Member implied that the evidence was in fact persuasive that conferencing had occurred. Furthermore, Union Pacific did not deny that conferencing had occurred. The panel said that "no matter how persuasive the evidence" (and it was), the fact of conferencing was irrelevant and that it was dismissing all five discharge cases without any hearing on the merits simply because this "evidence" had not been presented with the "evidence" as to the merits of the cases. As a result, there was no hearing on the merits. The five discharges were never considered.

In the district court, the BLET contended that the creation of a new procedural rule not in the RLA, Circular One, or the CBA was a denial of procedural due process and of fundamental fairness. The BLET framed the argument as a denial of procedural due process because: (1) the new procedural rule had no legitimate source in the federal statute, in Circular One, or in the procedural rules adopted by the parties themselves in their collective bargaining agreement, and (2) the BLET had no prior notice of such a rule – a rule with which it could have easily complied had it known of such a rule in advance. It was fundamentally unfair for the NRAB to create a new jurisdictional requirement of which the BLET had no notice.

At no time did Union Pacific challenge the availability of due process as a ground of review, either in the district court or in the U.S. court of appeals. Instead, Union Pacific simply denied that in fact the panel had violated procedural due process and merely argued that the Seventh Circuit rarely upheld a decision on this ground. Union Pacific did not argue that due process was or should be unavailable as a ground of review, that is until it submitted its petition for rehearing *en banc*.

◆

REASONS FOR DENYING THE PETITION

I) The alleged circuit split is illusory and has no practical effect.

At the outset it should be said that Union Pacific did not raise or object to the use of procedural due process as an available ground for reviewing the NRAB decision either in the district court or initially in the court of appeals. It raised this particular issue for the first time in its petition for re-hearing *en banc* with the U.S. court of appeals. The BLET filed a complaint which cited violation of its procedural due process rights as a ground of review in part because the Seventh Circuit had a decision directly on point based on denial of procedural due process. The BLET argued this due process position throughout the appeal in part because Union Pacific did not deny in the district court or in its response brief in the Seventh Circuit that procedural due process was available as a ground of review. Union Pacific did not make the argument it makes before the Court until filing its *en banc* petition.

A. The use of "procedural due process" as a ground for reviewing an NRAB decision under the Fifth Amendment is not significantly different from the review provided by the RLA.

The use of "procedural due process" under the Fifth Amendment is not significantly different from, and is arguably encompassed by, at least one of the express statutory bases of review: the failure of the NRAB panel to "confine or conform itself" to its statutory jurisdiction. The proper statutory role and jurisdiction of an NRAB panel is to decide a particular contract grievance. The Seventh Circuit's sensible decision in this matter makes this equivalence clear:

> Because no statute, regulation, or CBA required the evidence to be presented in the on-property record, because the Carrier could not have been prejudiced by the tardy submission of evidence, and because the Organization was prejudiced by the late objection, we find that the Board's decision to dismiss violated the due process rights of the Organization.
>
> – 7th Cir. Dec. at 22.

The court of appeals found a due process violation because the NRAB panel created a rule beyond those in its statutory jurisdiction, i.e. the RLA, Circular One, or the CBA. This is the same as saying it failed to "confine or conform itself" to its statutory jurisdiction – one of the grounds of review affirmatively provided by the RLA. This is in addition to the inherent equity jurisdiction which a federal district court has over constitutional claims. The NRAB panel was clearly exceeding its statutory authority as well as denying due process.

Had Union Pacific challenged the availability of procedural due process, the BLET might have *also* argued this alternative statutory ground. Instead, the BLET naturally relied on the leading case of *Chicago Rock Island and Pac. R.R. v. Wells*, 498 F.2d 913 (7th Cir. 1974), in which the Seventh Circuit struck down a novel procedural ruling as a denial of procedural due process. In both this case and *Wells,* one could have said the NRAB panel's use of a new rule not authorized by the Railway Labor Act, Circular One, or the collective bargaining agreement was a "failure" of the panel to "confine or conform itself" to its proper statutory authority. 45 U.S.C. 153 First (q). No doubt one can think of technical differences in the two rationales, and there may one day be a case where such differences actually exist. But there is no practical difference here.

In fact, this is really a dispute about nomenclature. It is unlikely that there is any case involving a constitutional violation – a denial of due process – that does not also involve some act by the NRAB in excess of its lawful authority, or put in the convoluted statutory parlance, an act that is a failure of the panel to "confine or conform itself" to its proper jurisdiction. *See, e.g., Kinross v. Utah Ry. Co.*, 362 F.3d 658 (10th Cir. 2004). That is why even circuits that do not use "procedural due process" as a ground of review still inquire as to whether the NRAB panel exceeded its authority by an act that in one way or another denies fundamental fairness.

In contradiction to Petitioner's concern about the broadening of judicial review of NRAB panels, the Seventh Circuit expressly noted the narrowness of its review. It reasserted the principle of *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192 (7th Cir. 1987) and *Bhd. of Locomotive Eng'ring v. Atchison, Topeka and Santa Fe R.R.*, 768 F.2d 914, 922 (7th Cir. 1985) that judicial review of arbitrations is limited to whether the arbitrator (in this field the NRAB panel) interpreted the contract – not how or how well – simply whether it was interpreted. 7th Cir. Dec. at 21. These cases clearly comport with the Court's own recent jurisprudence cited by Petitioner, *Hall St. Asscs., L.L.C. v. Mattel, Inc.,* 128 S. Ct. 1396 (2008). In the instant case, the court of appeals correctly found that the NRAB panel did not interpret the contract, and while it made its ruling based on the Fifth Amendment, it clearly would have reached the same outcome under the statutory review provided by the RLA.

This is clear as the NRAB panel created a new procedural rule not present in the RLA, Circular One, or the relevant CBA, that "evidence" as to conferencing had to be in the original submission of the record of the "on the property hearing" relating to the merits of the case. Relying on this entirely new "rule," announced for the first time in the very case it was ruling upon, the NRAB panel dismissed five discharge cases without any consideration of the merits.

This is, to say the least, a dereliction of duty of the NRAB panel.

Again contrary to Petitioner's assertion, the outcome in this matter would have been the same in any other circuit, whether it recognizes jurisdiction over constitutional claims or not. The facts recognized by the Seventh Circuit clearly show that the NRAB panel did not "interpret the contract" but rather created a new rule "according to [its] private notions of justice." *Atchison*, 768 F.2d 914, 922 (7th Cir. 1985). As argued *supra*, this is the same as saying that it failed to "confine or conform itself" to its statutory jurisdiction.

Indeed, the four Circuits that do not recognize constitutional jurisdiction over claims arising out of NRAB proceedings have all struck down arbitrary actions by NRAB panels under similar circumstances albeit with a different label.

Third Circuit

Petitioner cites *United Steel Workers of America Loc. 913 v. Union R.R. Com.*, 648 F.2d 905 (3rd Cir. 1981) as a case in the minority of the split. Yet even under that precedent, the instant case would have been decided the same. In overturning the district court's setting aside of the NRAB panel, the Third Circuit looked to the reasons the lower court gave, and examined whether the reasons fit into one of the three statutory grounds. *Loc. 913*, 648 F.2d 905 at 912. In the instant case, as argued *supra*, the "due process" violation consisted in creating a rule beyond those the Organization was already on notice of – namely those in the RLA, Circular One, and its own CBA. As argued *supra*, this ground falls under one of the three statutory grounds, and as such, would have had the same result had it been brought in the Third rather than the Seventh Circuit.

Sixth Circuit

Petitioner cites *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257 (6th Cir. 1984) as a case in the minority of the split. As in *Loc. 913*, the instant case would have had the same outcome on appeal had it been decided by the Sixth Circuit. In *Jones*, the Sixth Circuit noted that in arbitrations under the RLA:

> [c]ertain minimal procedural considerations must be afforded the parties, as Congress so required by enacting 45 U.S.C. § 153 First (j). Among these considerations, in order for there to be complete fairness to the litigants, we reason that Congress intended for all the arbitrators to hear the proof in evidence submitted by the parties and to consult with each other for the purpose of determining the proper resolution.
>
> – *Jones*, 728 F.2d 257 at 263-64.

In rendering its decision, the Sixth Circuit performed its constitutional role by interpreting the RLA and in determining what the arbitral body's powers and duties were under the RLA.[3] The Seventh Circuit performed the same analysis in the instant case when it held that the NRAB acted improperly because the RLA does not empower an NRAB panel to create new procedural rules beyond those found in the RLA, Circular One, and the relevant CBA. As such, the instant case would have had an identical outcome had it been decided in the Sixth Circuit.

Tenth Circuit

The case that best shows the lack of a practical distinction between reviewing a case under constitutional due process and under the three categories of statutory review provided in the RLA comes from the Tenth Circuit, which the Court overturned in *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89 (1978). In *Kinross v. Utah Ry. Co.*, 362 F.3d 658 (10th Cir. 2004), the Tenth Circuit explains its reason for determining that *Sheehan* precludes constitutional review in footnote 3:

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[3] It is well-established law that federal courts are the appropriate body to interpret what an act of Congress means. This is part of the layman's simplified understanding of the separation of powers doctrine – Congress makes law, the courts tell us what the law means, and the Executive enforces it. This is what held true in *Jones* – Congress passed the RLA, the Sixth Circuit interpreted it, and the Public Law Board was supposed to enforce it.

> We believe the Railway Labor Act itself provides for process sufficient to meet constitutional requirements. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). To satisfy due process requirements, a tribunal must not act outside its jurisdiction, and it must be impartial, see *Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Most importantly, a tribunal must ensure an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (quotation marks and citation omitted).
>
> Congress provided sufficient process to meet these due process requirements when it set forth the three grounds for judicial review in 45 U.S.C. § 153(q).
>
> * * *
>
> In the instant case, the district court improperly operated outside the bounds of these three grounds for judicial review by evaluating the scope of the evidence presented, and thus exceeded its subject matter jurisdiction.

By citing this venerable line of due process cases, the Tenth Circuit made it clear that any case which would violate the limited notions of fundamental fairness required by due process would be reviewable under the statutory categories in the RLA. This interpretation wisely avoids creating a conflict between the constitution – which requires that the United States shall not deprive a person of a right (such as employment under a union contract) without due process of law – and the RLA itself. The BLET maintains that the Tenth Circuit would have found that by creating a new jurisdictional requirement not found in the RLA, Circular One, or the relevant CBA, the NRAB panel would have denied the employees an "opportunity to be heard at a meaningful time and in a meaningful manner," and rule similarly.

Eleventh Circuit

Petitioner cites a final minority decision from the Eleventh Circuit, *Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985). *Henry* is a poor case for two reasons. First, although the plaintiff in that case did allege "fraud or corruption" as per the statutory standards of review, the only fraud or corruption he could point to was the presence of an impartial panel member. This complaint of impartiality was not made of the Neutral Member, but against the airlines' representative and ignored the presence of the union representative to offset the airlines'. Second, the ruling is based on a particular judicial philosophy that all due process under the Fifth Amendment is judicially created rather than extant in the constitution itself. "Therefore, *Sheehan* precludes judicially created due process challenges to System Board awards and Henry's argument based on due process concerns is without merit." *Henry* at 873.

Even with these flaws, the instant case would have had the same outcome in the Eleventh Circuit as in the Seventh. In *Henry*, the Eleventh Circuit cited to Fifth Circuit precedent for the rule that "an award must be enforced, without judicial review of the evidence, if it draws its essence from the collective bargaining agreement." *Citing Johns-Manville Sales v. Intern. Ass'n of Machinists*, 621 F.2d 756, 758 (5th Cir. 1980). In the instant case, the NRAB panel's award did not "draw its essence" from the CBA. Neither was it grounded in the RLA or in Circular One. As such, its decision to create a wholly new jurisdictional rule would have been held to be in clear excess of its jurisdiction.

B. The availability of constitutional review of NRAB proceedings has had a negligible effect on labor-management relations in affected industries.

There is no issue of "national significance" here since no federal court is ever willing to upset an arbitration award except under extraordinary circumstances when a panel has acted in some very peculiar and bizarre way outside of its statutory mission. The false premise here is that there really is any difference between the use of procedural due process and the use of the express statutory bases of review. As argued *supra*, any act that constituted a denial of procedural due process – which is a very high standard – would almost certainly entail some act or conduct that exceeded the panel's jurisdiction or authority within the meaning of 45 U.S.C. 153 First (q) as well. In other words, this is all an issue of nomenclature rather than one of any significant standard of judicial review.

Furthermore, Union Pacific makes a contradictory argument. It says on the one hand that it is urgent for this Court to resolve a conflict among the Circuits with respect to the use of procedural due process. Then it says on the other hand that it is extremely rare for the courts to use procedural due process as a ground for review. Indeed, as Union Pacific acknowledges, no court has used procedural due process to invalidate an award for thirty years or more prior to this case. The Seventh Circuit itself noted that, "[t]his case presented a unique situation which we doubt will come before a court again." 7th Cir. Dec. at 21. The Court should not take up a case which will have no practical effect.

II) The NRAB cannot engage in adjudicatory rulemaking.

Petitioner presents this issue for the first time, apparently in response to a separate concurrence with the denial of its petition to the court of appeals for a rehearing *en banc*. Unfortunately for it, musings in *dicta* in a concurrence – no matter the jurists making them – do not create an immediate path to review by this Court. It is also disingenuous to argue that the NRAB is a rulemaking or adjudicative agency like the NLRB or the SEC. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

It is a false premise that the NRAB is an agency like the NLRB or SEC and that it can and should begin adopting agency "rules" in the way these other agencies do, whether by formal rulemaking or adjudication. This is a misconception of the way the NRAB operates. The NRAB has its own unique legal framework. Technically, it is a federal agency, but there is no other agency like it. Even if this Court were to take this case only to say the NRAB should *not* be in this legal framework, the very raising of this question in the nation's highest court might unsettle the way the NRAB now works – this has never been and should not be a "rulemaking" federal agency as Union Pacific contends.

The NRAB is less an administrative agency than a service provider like the American Arbitration Association or the Federal Mediation and Conciliation Service. It does not apply federal law, as the NLRB and SEC do. Rather it resolves grievances under private labor agreements by providing an ostensibly neutral third member to a panel containing a representative of the union and one of the company. It provides this service under the authority and sanction of the government. Since it does not apply federal law it does not build up a body of precedents as the NLRB, SEC, or similar agencies do. The NRAB does not have a Commissioner or Chair or Members who are appointed and confirmed by the Senate. There is no General Counsel. There is no body of case law, no codification of agency precedent. Indeed, there is no precedent, as the Seventh Circuit noted on pp. 15-16 of its decision, *citing*, *inter alia*, Carlton Snow, *An Arbitrator's Use of Precedent*, 94 Dick. L. Rev. 665, 672-74 (1990). The decision written by a private arbitrator who is the Neutral Member in one *ad hoc* panel on one discharge case can be cited, but is not precedent that is binding or which must be followed by any other panel. In short, an NRAB panel by its nature and Congressionally mandated function cannot engage in any "rulemaking," let alone retroactive rulemaking by adjudication.

Accordingly, in this system of contract arbitration, the arbitrators or Neutral Members cannot adopt "rules" like the rules of the NLRB or the SEC if those rules are not in the RLA, Circular One, or in the parties' own CBA's. Congress has provided NRAB panels with a limited role which does not include rulemaking.

In this case, a single NRAB panel came up with a new "jurisdictional" rule that had no basis in the RLA, in Circular One, or the collective bargaining agreement. In doing so the particular NRAB panel in this case abused or acted outside its authority. To use the parlance of the Railway Labor Act, it refused to "conform or confine itself" to its proper jurisdiction, which was to apply the collective bargaining agreement itself. Union Pacific refers disingenuously to "Board rules" and "Board standards." But there is no such body of rules or standards, other than the rules that are set out in Circular One or in the parties own particular collective bargaining agreements. Nor does Union Pacific point to or cite to any other verifiable source where these "rules" are kept or codified.

At any rate it is misleading to even talk about the application of a "rule." Because no decision has any precedent, the "rule" of this panel may never be applied by any other panel again. Obviously even in private labor arbitration decisions, a private labor arbitrator can cite a prior arbitration case that strikes him or her as relevant, and NRAB Neutral Members cite prior arbitration cases in this same manner. They are not, however, bound to follow these decisions.

III) Congress has never clearly eliminated the jurisdiction of Art. III courts to hear constitutional claims arising out of NRAB proceedings.

Of course, procedural due process review is and should be available in the rare case it is needed. After all, Congress did not preclude the original equity jurisdiction of the courts to enjoin governmental invasions of constitutional rights. It has long been clear that the NRAB is a governmental agency, and since it is so, it should be presumptively subject to constitutional restraint. *Elmore,* 782 F.2d 94, 96. Unless there is "clear and convincing evidence" that Congress expressly barred the Art. III jurisdiction of the federal courts, federal district courts retain original equity jurisdiction to stop such denial of procedural due process even when Congress has provided a mechanism for statutory review. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *see also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

It is a "well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and [the Court will] not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by '"clear and convincing"' evidence." *Califano*, 430 U.S. 99 at 109, *citing Johnson v. Robinson*, 415 U.S. 361 (1974). Providing a list of grounds for *statutory* review as Congress did in 45 U.S.C. 153 First (q), is not "clear and convincing" evidence that it sought to foreclose constitutional review. Furthermore, not even in *Sheehan* did the Court make a finding of such "clear and convincing" evidence of Congressional intent to bar constitutional review.

IV) None of the issues presented are properly before the Court.

A. Petitioner has waived the issue of Art. III jurisdiction to hear constitutional due process claims arising out of NRAB proceedings.

Petitioner first raised the issue of the propriety of Article III jurisdiction to hear constitutional claims arising out of NRAB proceedings in its petition to the Seventh Circuit Court of Appeals for a rehearing or a hearing *en banc*. It did not raise the issue before the district court. It did not raise the issue in its response brief in the Court of Appeals. As such, it has clearly waived this issue, and it is not properly before the Court. *California v. Taylor*, 353 U.S. 553, 557 (1957). As argued *supra*, there is little practical difference in the outcomes of cases across Circuits due to the split. As such there is no exceptional circumstance such that the Court should make an exception to the rule against hearing issues not addressed by the lower courts. *Youkim v. Miller*, 425 U.S. 231, 234 (1976).

B. The issue of whether the NRAB engaged in permissible adjudicatory rulemaking is not properly before the Court.

Similarly, the issue of whether the NRAB engaged in permissible adjudicatory rulemaking is not properly before the Court because it was not raised before the district and appellate courts. As noted *supra*, it was raised for the first time in a two-judge concurrence which denied the petition for rehearing or hearing *en banc*. Accordingly, it is not properly before the Court as the lower courts did not weigh in on this issue. *Taylor*, 353 U.S. 553, 557; *Youkim*, 425 U.S. 231, 234.

◆

CONCLUSION

The Court should decline to grant *certiorari* because any such decision will make no practical change in labor-management relations under the RLA. The reasons that employees bring a claim under 45 U.S.C. 153 First (q) are the same reasons that employees bring a claim under the Fifth Amendment. Courts apply the same analysis to both claims – a review for a fundamental unfairness that prevented a claim from being heard. The Court should not take up a case which would have such an empty result. Furthermore, the lower courts were not given the opportunity to properly address the issues presented by Petitioner, and there are no extraordinarily compelling reasons for the Court to do so itself.

Respectfully submitted,

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REPLY
BRIEF

117 (4)

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Edelman v. W. Airlines, Inc.,
892 F.2d 839 (9th Cir. 1989) 3, 4

Finley Lines Joint Protective Board Unit 200 v. Norfolk Southern Railway Co.,
312 F.3d 943 (8th Cir. 2002) 8, 10

Henry v. Delta Airlines,
759 F.2d 870 (11th Cir. 1985) 6

International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad,
24 F.3d 369 (2d Cir. 1994) 4

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 9

Jones v. St. Louis-San Francisco Railway Co.,
728 F.2d 257 (6th Cir. 1984) 7

Kinross v. Utah Railway Co.,
362 F.3d 658 (10th Cir. 2004) 5, 6

Kinross v. Utah Railway Co.,
No. 2:01-CV-0010BSJ, 2006 U.S. Dist. LEXIS 23162 (D. Utah Apr. 6, 2006) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Kinross v. Utah Railway Co.,
No. 2:01-CV0010J, 2006 U.S. Dist. LEXIS 87749 (D. Utah Oct. 24, 2006) 5

Lebron v. National Railroad Passenger Corp.,
513 U.S. 374 (1995) 1

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 2

Norfolk & Western Railway Co. v. Transportation Communications International Union,
17 F.3d 696 (4th Cir. 1994) 8, 9

Pokuta v. Trans World Airlines, Inc.,
191 F.3d 834 (7th Cir. 1999) 4

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 10

Shafii v. PLC British Airways,
22 F.3d 59 (2d Cir. 1994) 3

Smith v. American Eagle Airlines, Inc.,
No. 07 CV 3363(NG), 2008 WL 2600857 (E.D.N.Y. July 1, 2008) 3

Sullivan v. Malin,
No. 3:07cv495, 2008 WL 1883283 (W.D.N.C. Apr. 24, 2008) 5

Page(s)

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987) 9

United Steel Workers of America Local 1913 v. Union Railroad Co., 648 F.2d 905 (3d Cir. 1981) 6

United Transportation Union v. Union Pacific Railroad Co., 116 F.3d 430 (9th Cir. 1997) 3

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 1

STATUTES

45 U.S.C. § 153 First (q) 6

OTHER AUTHORITY

Pub. L. Bd. No. 1312, Award No. 156 (1976), *available at* http://kas/cuadra.com/star/images/nmb/020014BF.pdf 9

The Railway Labor Act (Michael E. Abram et al. eds., 2d ed. 2005) 7

ARGUMENT

Respondent Brotherhood of Locomotive Engineers and Trainmen ("BLET") concedes that there is a clear 5-4 split among the circuits; that "thousands of arbitration cases are affected by the split"; and that the decision below rested solely on a due process exception rejected by other circuits. Opp. 1, 9. As Chief Judge Easterbrook emphasized, "[o]nly Congress or the Supreme Court can bring harmony" to this statutory scheme, and Respondent offers no persuasive reason to deny review.

1. Respondent contends that neither of the questions presented in the petition are properly before this Court. Its argument misunderstands the governing standard as well as the record below.

First, Respondent does not dispute that the Seventh Circuit expressly addressed and decided both questions. As the opinion plainly reflects, the Seventh Circuit "decline[d] to depart from [its] prior holdings" that "allow[] judicial review of Board orders where a party asserts a due process violation," Pet.App.8a-9a, and further held in no uncertain terms that "[w]hen a Board creates a new requirement on its own" it "violate[s] the due process rights of the parties," Pet.App.22a. As explained in the petition, this Court "'permit[s] review of an issue'" that has *either* been pressed *or* "'pass[ed] upon'" below. Pet. 11 n.4 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented."). Having no answer to this authority, Respondent simply ignores it.

Second, the Seventh Circuit no doubt "passed upon" both questions because it recognized that Union Pacific had properly preserved those issues in its briefing below. Even though the Seventh Circuit had resolved the first question more than two decades ago, Union Pacific still called the court's attention to the split and made clear that it was only assuming *arguendo* that due process review could "ever" be appropriate. *See* Brief of Defendant-Appellee ("Def.-Appellee Br.") at 14 n.5, 22, 23-24 (7th Cir. filed Oct. 27, 2006). In light of the fact that the panel was plainly bound by the law of the circuit, nothing more was required at that stage of the proceedings. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (issue not waived where argument "would be futile" because prior circuit "precedent precluded jurisdiction over petitioner's ... claims, and the panel below had no authority to overrule" precedent). Indeed, the Seventh Circuit panel understood the statements in Union Pacific's brief to be an effort to "cast doubt on the law of this Circuit," and expressly rejected that effort by reaffirming adherence to its longstanding rule. Pet.App.8a-9a. And, as Respondent concedes, Union Pacific squarely presented the issue in its petition to the *en banc* court at the rehearing stage.

With respect to the second question, Union Pacific's brief argued that "BLET is unable to point to a single case holding that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule, so long as both sides are in fact allowed to make their case on the disputed evidentiary point." Def.-Appellee Br. at 26; *see also id.* at 25 ("The Union improperly reads [prior circuit precedent] as standing for the proposition that the application of a 'new' procedural rule, without prior notice to the disadvantaged party, necessarily constitutes a denial of due process."). That is the precise issue raised in Question 2. There is no bar to this Court's review of either question.

2. BLET also asserts that resolution of the first question presented is unnecessary. It contends that the circuit conflict is "illusory" because the fourth, judicially-created exception is identical to the statutory grounds for review and that this case accordingly would have come out the same way under one of the statutory exceptions. Opp. 6-16. Not so.

First, the 5-4 split is far from "illusory." Respondent would have this Court find that five circuits decided to establish a controversial "fourth" ground for review for no reason at all. Certainly those courts did not regard the statutory grounds as merely duplicative. For example, the Second Circuit recognized an *independent* due process ground for review, based on its view that failure to do so "would leave unprotected a plaintiff's legitimate constitutional right to be treated in accord with due process before the Board." *Shafii v. PLC British Airways,* 22 F.3d 59, 64 (2d Cir. 1994); *see also, e.g., Smith v. Am. Eagle Airlines, Inc.,* No. 07 CV 3363(NG)(RER), 2008 WL 2600857, at *3 n.3 (E.D.N.Y. July 1, 2008) ("Second Circuit cases ... make clear that a due process challenge is an *independent* ground for judicial review ....") (emphasis added); *United Transp. Union v. Union Pac. R.R. Co.,* 116 F.3d 430, 432 (9th Cir. 1997) (describing due process as an "*independent* ground, *in addition* to the three enumerated in the statute") (emphasis added); *Edelman v. W. Airlines, Inc.,* 892 F.2d 839, 846 (9th Cir. 1989) (holding that "due process challenge does provide an *independent* basis for our jurisdiction") (emphasis added); *id.* at 847 (holding that "a constitutional challenge constitutes an *independent* ground, *in addition to* the three expressly stated in section 153 First (q)") (emphasis added).

Indeed, the extra-statutory due process exception is problematic precisely because it is untethered from the specific grounds set forth in the Railway Labor Act ("RLA"). By definition, this additional exception allows a court to substitute its own judgment about "fundamental fairness." Opp. 8-9. An amorphous and easy to manipulate "due process" exception invites backdoor challenges and encourages searching review of arbitrator decisions.

And while Respondent doubts that there has been or ever will be "*any* case involving a constitutional violation—a denial of due process—that does not also involve some act by the NRAB in excess of its lawful authority," Opp. 8 (emphasis added), courts have held otherwise. In *International Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter Railroad* (cited at Pet. 18), the Second Circuit affirmed the vacatur of an NRAB award on due process grounds only after explicitly holding that "[n]one of [the statutory grounds] applies here." 24 F.3d 369, 371 (2d Cir. 1994).[1] And even in those cases where due process allegations are ultimately rejected, they are still considered as an additional, non-duplicative ground for relief. *Compare, e.g.*, *Pokuta v. Trans World Airlines,*

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[1] Respondent also erroneously contends that Union Pacific conceded that "no court used procedural due process to invalidate an award for thirty years or more prior to this case." Opp. 16. Petitioner made no such assertion.

Inc., 191 F.3d 834, 839 (7th Cir. 1999) (holding that employee's objections fall within "none of [the statutory] categories," but then engaging in additional analysis after noting "[h]owever, we have recognized a fourth category of objections ... an allegation that a party was denied due process"), *with Sullivan v. Malin,* No. 3:07cv495, 2008 WL 1883283, at *3 (W.D.N.C. Apr. 24, 2008) (holding that because employee's objections fall outside the three grounds "enumerated by statute" and because the court has no jurisdiction over "due process allegations" analysis ends and case is dismissed). In short, the mere *availability* of this "fourth" ground for review prolongs disputes and contravenes Congress' call for finality.

Respondent also mistakenly relies on *Kinross v. Utah Railway Co.*, 362 F.3d 658 (10th Cir. 2004), for its view that a due process violation would also invariably exceed a Board panel's jurisdiction. Opp. 8, 12-13. The district court in that case initially vacated the arbitrators' award on due process grounds. On appeal, the Tenth Circuit reversed and remanded because Congress had not authorized due process review. On remand, the district court then rejected the *statutory* grounds advanced by the plaintiff and affirmed the arbitration award. *See Kinross v. Utah Ry. Co.*, No. 2:01-CV-0010BSJ, 2006 U.S. Dist. LEXIS 23162 (D. Utah Apr. 6, 2006); *Kinross v. Utah Ry. Co.*, No. 2:01-CV0010J, 2006 U.S. Dist. LEXIS 87749 (D. Utah Oct. 24, 2006). The availability of *independent* due process review was outcome-determinative and transformed what was designed as an efficient vehicle to keep minor disputes out of the courts into a more than five year court battle.

Second, Respondent's insistence that the outcome in this case "would" have been the same in circuits that do not recognize an independent due process exception is both irrelevant and wrong. Opp. 8, 9. There is no cause for this Court to deny review based on speculation about how courts would resolve a statutory argument that the Seventh Circuit did not decide and the district court necessarily rejected. And Respondent provides no reason to believe that any circuit would vacate this award under the statutory exceptions set forth in the text of the RLA in any event.

The only statutory exception Respondent relies on permits judicial review for "failure of the order to confirm, or confine itself, to matters within the scope of the division's jurisdiction." 45 U.S.C. § 153 First (q). Respondent points to four cases to argue that "the outcome in this matter would have been the same"—*i.e.*, the Board's award would not have been sustained—had the matter been brought in those circuits under this statutory ground for review. Opp. 10.

But of the four cases it cites, only *one* actually vacated an arbitration award on statutory grounds. As for the others, two courts affirmed awards without any analysis of the statutory exception cited by Respondent. *See United Steel Workers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905 (3d Cir. 1981); *Henry v. Delta Airlines*, 759 F.2d 870 (11th Cir. 1985). In the third, *Kinross*, 362 F.3d 658, the award was affirmed on remand after the district court expressly held that the jurisdictional exception did not apply. *See supra* at 5. And although the Sixth Circuit did reverse an arbitration award as "exceed[ing] [the panel's] authority," it did so only where the arbitration panel violated *express* terms of the collective bargaining agreement ("CBA"). *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 266 (6th Cir. 1984) (holding Board panel exceeded its jurisdiction by rendering a decision 14 *months* after the hearing date when the CBA mandated an award within 15 *days*).

Here, it is undisputed that the Board did not ignore express terms of the CBA. To the contrary, Respondent's claim rests on the fact that the agreement was silent. Opp. 3 (The CBA is "silent as to how the fact that conferencing occurred can be shown."). All agree (and the rules make clear) that conferencing is required, and that all evidence must be submitted in the on-property record. Pet.App.12a-13a, 17a-18a. The Board's interpretation of these rules to mean that evidence of conferencing—like all other evidence—must be included in the on-property record does not amount to a failure of the Board to "conform" or "confine" itself to matters within the scope of its jurisdiction. *See The Railway Labor Act* 426-27 (Michael E. Abram et al. eds., 2d ed. 2005) ("A reviewing court will determine that an adjustment board acted within its jurisdiction ... unless it ignored 'clear and unambiguous provisions' in the parties' agreement.") (citations omitted).

Other courts have recognized that a Board panel does not act outside its jurisdiction merely by resolving procedural disputes where the parties' agreement is silent or ambiguous. For example, the Fourth Circuit rejected objections made under this statutory exception where "the Board did not ignore the plain meaning of the language in the arbitration agreement," but rather decided the evidentiary issue presented in the common law tradition. *Norfolk & W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 701-02 (4th Cir. 1994). The court explained that where the agreement is silent, the parties have "effectively ceded to the arbitrators the task of defining the scope of their power by providing in the contractual language little guidance to the arbitrators as to their powers." *Id.* at 701; *see also Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (Board panel acted within its jurisdiction when it decided evidentiary issue absent "'specific controlling language in the collective bargaining agreement'") (citation omitted).

Thus, it is far from clear (and, indeed, quite unlikely) that the Seventh Circuit or "any other circuit" "would have reached the same outcome" absent an independent, judicially-created due process exception. Opp. 10, 9. The very real and significant circuit split is squarely presented.

3. Respondent offers no reason why this Court should deny review of the second question presented if it grants the first. Instead, Respondent merely tries to defend the merits of the Seventh Circuit's expansive holding that "new" rules (or really interpretations of already existing rules) cannot be applied to the parties before the tribunal without violating due process. It contends that the authorities cited in the petition are inapposite because arbitrators "cannot adopt 'rules' ... if those rules are not in the RLA, Circular One, or in the parties' own CBA's." Opp. 18. That argument is unfounded and hardly a basis to deny plenary review of a holding that threatens to constitutionalize a broad range of procedural rulings issued in the course of arbitrations Congress sought to expedite.

Arbitrators, like judges, are charged with adjudicating the case before them. Not every factual scenario has been anticipated and spelled out in the RLA, Circular One, or the parties' agreement. To discharge their duty to decide the case, Board panels *must* (and do) have the authority to interpret and apply general rules in specific contexts where the parties might reasonably disagree about what the general rule means. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) ("When the subject matter of a dispute is arbitrable, 'procedural' questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.") (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)); *Norfolk & W. Ry. Co.*, 17 F.3d at 701 (the power to decide evidentiary and procedural matters is "implicit in the powers expressly conferred upon [the panel] by the parties"). Indeed, Board panels have adopted a variety of common law "rules" through adjudication. *See, e.g.*, Pub. L. Bd. No. 1312, Award No. 156 at 3 (1976), *available at* http://kas.cuadra.com/star/images/nmb/020014BF.pdf (reading doctrine of laches into the RLA based on "[p]ublic [p]olicy, as enunciated by both statute and Court decision ... to handle disputes concerning the proper application of collective bargaining agreements expeditiously" and dismissing claim on laches ground without adjudicating merits).

The party on the losing end of such applications will *always* say that the panel created a "new rule." Equating this routine common law or agency adjudication with a due process violation, as the Seventh Circuit did, threatens to transform what was supposed to be "among the narrowest" standards of review "known to the law" into a free pass to second-guess the merits of the arbitrators' interpretation.

It also contravenes this Court's and other circuits' precedents. *See* Pet. 24-28. Respondent suggests that those cases have no application here because the NRAB is not really an "administrative agency,"[2] and because its decisions do not constitute binding precedent.[3] This unnecessarily complicates the issue. The precedential force of a Board award is irrelevant for the question presented: whether a supposedly "new" interpretation of already existing rules can be applied "retroactively" *to the case at hand*. Likewise, whether the NRAB is more like a "traditional" administrative agency or a quasi-judicial tribunal is of no moment. The law is well-settled that "[e]very case of first impression has a retroactive effect, *whether the new principle is announced by a court or by an administrative agency*." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (emphasis added).

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[2] Notably, Respondent is more than happy to cloak the NRAB with the "federal administrative agency" title when it suits them. *Compare* Opp. 17 ("The NRAB is less an administrative agency than a service provider like the American Arbitration Association or the Federal Mediation and Conciliation Service."), *with* Reply Br. at 9 (7th Cir. filed Nov. 13, 2006) ("The NRAB is not a private arbitrator ...; it is a federal administrative agency."), *and* Answer to Reh'g Pet. at 6 (7th Cir. filed May 14, 2008) (same).

[3] In fact, it is well-understood that (binding or not) NRAB panels can and do rely on "rules" announced in prior Board awards on a routine basis. *See Finley Lines*, 312 F.3d at 947 ("[I]t is well established that arbitrators may look to outside sources, including prior unrelated awards, without straying beyond their jurisdiction ....").

The Seventh Circuit's due process analysis exacerbates its error in recognizing an extra-statutory due process exception in the first place. It turns the NRAB from a tribunal charged with adjudicating disputes and issuing final and binding awards into a powerless entity left ineffectual when unanticipated issues arise. This Court's review is needed.

* * *

In the end, there is an undisputed and entrenched 5-4 split among the circuits—a split that has persisted for decades and that affects thousands of arbitration decisions in the railroad and airline industries. The questions presented are properly before this Court, are squarely at issue, and directly impact "the stability of labor relations in industries that Congress has deemed critical to the national economy." Mot. For Leave to File Brief of *Amicus Curiae* in Support of Petition for a Writ of Certiorari at 2. This Court's review is needed now and Respondent provides no sound reason to deny certiorari.

CONCLUSION

The petition for certiorari should be granted.

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MOTION FILED

DEC - 5 2008

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(2) 114

No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the National Railway Labor Conference ("NRLC"), the Association of American Railroads ("AAR"), and the Airline Industrial Relations Conference ("AIRCON") move for leave to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari.

The *amici* are filing this motion because the respondent, Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, has refused to consent to the filing of this brief. The petitioner, Union Pacific Railroad Co., has consented to the filing of this brief, and its letter of consent has been lodged with the Clerk of the Court.

The *amici* seek to file the attached brief to emphasize the importance of the question presented in this case to the railroad and airline industries in the United States – the two industries whose labor relations are regulated by the Railway Labor Act. The question presented affects the efficacy of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in industries that Congress has deemed critical to the national economy. The *amici* represent the collective views of the Nation's major rail and air carriers.

The NRLC is an unincorporated association whose membership includes all of the Class I freight railroads in the United States and many smaller lines. The NRLC, through its National Carriers' Conference Committee, represents most of its members in multiemployer collective bargaining under the RLA. It also represents the industry on labor-related issues (including grievance arbitration) before congressional committees, other governmental bodies, and the courts. The NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro Football*, 518 U.S. 231 (1996), and *Conrail v. RLEA*, 491 U.S. 299 (1989).

AAR is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States. Members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR represents its members in connection with numerous administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this

Court in numerous cases, including *Norfolk Southern Ry. Co. v. Kirby*, 125 S. Ct. 385 (2004), *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), and *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000).

AIRCON was formed in 1971 as a voluntary association of various passenger and air cargo carriers. AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial, and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000), *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989), and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

Because the *amici* represent virtually all of the major rail and air carriers covered by the Railway Labor Act, the views of the *amici* expressed in the attached brief will assist the Court in understanding the scope and impact of the issues presented by the lower court's decision. The Seventh Circuit's decision continues a conflict among the courts of appeals with respect to the legal standards for federal court review of grievance-arbitration awards under the Railway Labor Act ("minor disputes"). In addition, the court has inappropriately expanded the bases for judicial review of such awards, and has thereby prolonged the resolution of potentially disruptive grievance disputes. This is a great concern to *amici*. Thus, the *amici* seek leave to file the attached brief urging the Court to grant the petition.

Respectfully submitted,

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December 5, 2008

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n et al., 491 U.S. 299 (1989) 3

Gunther v. San Diego & AE R.R. Co., 382 U.S. 257 (1965) 5

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 3

Int'l Ass'n of Machinists Central Airlines, Inc., 372 U.S. 682 (1963) 5

Jones v. Seaboard System R.R., 783 F.2d 639 (6th Cir. 1986) 9

Kotakis v. Elgin, Joliet & E. Railway, 520 F.2d 570 (7th Cir. 1975) 9

Landers v. Nat'l R.R. Passengers Corp., et al., 485 U.S. 652 (1988) 8

Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89 (1978) 6, 8, 9

United Paperworkers, Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 8

United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) 8

FEDERAL STATUTES

5 U.S.C. §§ 551 et seq. (2006) 9

45 U.S.C. § 151(a) (2006) 2

45 U.S.C. § 152 (2006) 4

45 U.S.C. §§ 153, 184 (2006) 5

Page

45 U.S.C. §§ 153(i), 184 (2006) 4

45 U.S.C. § 153(m) (2006) 5

45 U.S.C. § 153(q) (2006) 5, 6

45 U.S.C. § 185 (2006) 5

Pub. L. No. 73-442, 48 Stat. 1185 (1934) 6

Pub. L. No. 74-487, 49 Stat. 1189 (1936) 6

Pub. L. No. 89-456, 80 Stat. 208 (1966) 7

OTHER AUTHORITY

Benjamin Aaron et al., *The Railway Labor Act at Fifty* (1977) 7

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John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* (1981) 5

The Railway Labor Act (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005) 4, 7

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST [1]

The interests of the *amici* are set forth in the preceding motion and therefore are not repeated here.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The questions presented in the petition are important to the stability of labor relations on the Nation's railroads and airlines, as well as to the administration of the Railway Labor Act ("RLA" or "Act"). The Act calls for the "prompt and orderly settlement of all disputes growing out of grievances." 45 U.S.C. § 151(a) (2006). The achievement of this statutory goal depends in large part on the finality that attends the Act's grievance-arbitration procedures. The decision below is inconsistent with the language, structure, and purpose of the Railway Labor Act because it undermines the practical finality of adjustment board awards by expanding the bases for judicial review and prolonging the resolution of disruptive minor disputes.

The current division among the various courts of appeals over the legal standards for reviewing adjustment board awards encourages forum shopping for a circuit and court in which to file a petition for review. The pending petition should be granted not only to promote uniformity in the law, but also because Congress intended that disputes over grievances in these vital industries should be finally decided by the grievance-arbitration procedures specified in the RLA, subject only to the Act's narrowly delineated standards for federal court review. The court of appeals decision is an invitation for the losing party to take a second bite at the same apple. In addition, the Act's carefully defined standards, in contrast to elusive concepts of arbitral "due process," reduce the risk that inconsistent judicial adjudications will lead to disparate treatment of similarly situated employees and to the very labor discord that the Act was designed to prevent. The various boards of adjustment provided for in the Railway Labor Act are established and conducted by labor and management as an adjunct to the bargaining process in order to resolve disputes about grievances and collective agreements. Awards are made by representatives of the parties. Only if they deadlock does a neutral arbitrator become involved. The "due process" provided by adjustment boards is set out in Section 3 of the Act, and also by the procedures and practices of the boards and the collective agreements that implement the statute.

The questions presented in the petition for a writ of certiorari are important to the rail and air industries because they will affect how decisively adjustment board awards will bring closure to labor-management disputes over grievances and the interpretation or application of labor agreements. The pendency of minor disputes is an obstacle to a properly functioning work-place.

ARGUMENT

When Congress enacted the Railway Labor Act, it intended to promote stability in railroad labor-management relations by establishing a comprehensive framework for resolving labor disputes. Two classes of disputes directly addressed by the RLA involve (i) the formation of collective bargaining agreements ("major disputes"), and (ii) grievances or the interpretation of agreements covering rates of pay, rules, or working conditions ("minor disputes"). *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n et al.*, 491 U.S. 299, 302 (1989) ("Major disputes seek to create contractual rights, minor disputes to enforce them.") (citing *Elgin, Joliet & Eastern Ry. Co.*

v. Burley et al., 325 U.S. 711, 723 (1945)).[2] The two procedures are complementary because the principal purpose of the grievance-arbitration procedure is to apply the collective bargaining agreement to day-to-day events and disputes at the workplace.

Grievance resolution in the railroad and airline industries begins with grievance and/or disciplinary proceedings conducted by management and labor representatives at the employing railroad or airline carrier. They are characterized as "on the property" proceedings. Details of these procedures are largely spelled out in the applicable collective bargaining agreements on each carrier. The Railway Labor Act requires that such disputes be "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." 45 U.S.C. §§ 153(i), 184 (2006). The "on the property procedures" include satisfying the statutory requirement that representatives of the carrier and employees "confer in respect to such dispute." § 152 Sixth. This duty to meet in conferences to resolve disputes appears throughout the RLA, for example in Sec. 2 Second, Sec. 2 Sixth, and Sec. 6, reflecting a general intent that disputes are best resolved by the parties themselves.[3]

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[2] The Railway Labor Act also establishes the procedures for resolving disputes over the identity of collective bargaining representatives or "representation disputes." 45 U.S.C. § 152 (2006).

[3] Judicial construction describes the conference process as short of formal negotiations, but a process that facilitates reasonable communication and a good faith desire to settle the dispute. *The Railway Labor Act* 323, 402-05 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

If a dispute is not resolved on the property, it may be referred by either party to an adjustment board. The Act authorizes a variety of adjustment boards with different geographic and subject-matter jurisdictions. Sec. 3 First (National Railway Adjustment Board); Sec. 3 Second (system, group, regional, and special adjustment boards) (railroads); Sec. 184 (system, group, and regional boards) (airlines); 45 U.S.C. §§ 153, 184 (2006). Some boards deal with disputes on one carrier. The National Railroad Adjustment Board ("NRAB"), whose awards are at issue, is a standing board with general jurisdiction throughout the railroad industry.[4]

The various adjustment boards existing under the Act have similar characteristics: They are expert bodies typically composed of an equal number of representatives from management and labor, who are "peculiarly familiar with the thorny problems and the whole range of grievances." *Gunther v. San Diego & AE R.R. Co.*, 382 U.S. 257, 261 (1965). The boards include, when necessary, experienced neutral arbitrators to join the parties' representatives to break deadlocks. The Act specifies that adjustment board awards are conclusive, final, and binding on the parties. 45 U.S.C. § 153(m), (q) (2006); § 153 Second; *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S 682, 686 (1963). A restricted judicial review of adjustment board awards is also set out in the statute. The statute provides only three bases for review: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption by a Board member. 45 U.S.C. 153 First (q) (2006). "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts. The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) (citation omitted).

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[4] The National Mediation Board has not exercised its discretion to establish a National Air Transport Adjustment Board as a counterpart to the NRAB. 45 U.S.C. § 185 (2006). Consequently, system and regional boards of adjustments operate by agreement of labor and management pursuant to Sec. 184 of the Act. John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 191 (1981).

The questions presented in the petition for a writ of certiorari are important to the rail and air industries because they will affect how decisively adjustment board awards will bring closure to labor-management disputes over grievances and the interpretation or application of labor agreements. The pendency of minor disputes is an obstacle to a properly functioning work-place.

Congress has shared this concern. It has twice modified the Act's minor dispute procedures to expedite final resolutions and to enhance their effectiveness. In 1934, Congress established the National Railroad Adjustment Board with the intention of having its awards be final and binding on the parties. The amendment made the Adjustment Board procedures mandatory and provided for the appointment of neutrals in the event of deadlocks. The board's findings and orders, with expressly defined exceptions, "shall be conclusive on the parties." Pub. L. No. 73-442, 48 Stat. 1185 (1934).[5] In 1966, Congress again modified Section 3 to expedite the resolution of rail grievances, by authorizing alternative special adjustment boards (so-called "public law boards")[6] to speed up the award process and to eliminate the backlog of pending grievances. Pub. L. No. 89-456; Benjamin Aaron et al., *The Railway Labor Act at Fifty* 229 (1977).

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[5] In 1936, Congress authorized a similar grievance-arbitration procedure for the airline industry. Pub. L. No. 74-487, 49 Stat. 1189 (1936).

Grievances are an inevitable part of the workplace in the highly organized rail and airline industries. The awards at issue here involve five disciplinary grievances arising out of the violation of railroad operating rules. The National Mediation Board, the federal agency that administers aspects of the Railway Labor Act, formally logged almost 5,000 new cases in the railroad industry during FY 2007,[7] and a multiple of that number undoubtedly were initiated but not progressed to the adjustment boards. Similarly, in the airline industry, while the number of grievance arbitrations is more difficult to track, it was reported that during 1988 more than 15,000 grievances were filed and about 17% were expected to progress to arbitration. It was also estimated that 8,000 cases were decided by airline system boards of adjustment in 1988.[8] Grievance procedures that provide expeditious solutions to disagreements reduce potentially disruptive labor-management controversies.

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[6] These special boards are called "public law boards" because they were authorized by the Public Law that is now codified in §3 Second (2 para). *See The Railway Labor Act* 72, 410-12 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

[7] National Mediation Board, *2007 Annual Report*, *available at* http://www.nmb.gov/publicinfo/foia-fy2007rpt.pdf.

[8] Dana Eischen & Mark Kahn, *Grievance Handling and Arbitration in the Airlines Industry: Can they be Improved?*, in *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads*, Society of Professionals in Dispute

From a labor relations perspective, the prompt finality of awards by the NRAB, system boards or public law boards is central to the grievance-arbitration procedures in the RLA. *Landers v. Nat'l R.R. Passengers Corp., et al.*, 485 U.S. 652, 656 (1988). Congress and the *Sheehan* Court understood that the expansion of judicial review undermines finality, prolongs disputes, and moves the application and interpretation of collective agreements away from expert decision-makers and into a generalist judiciary. "[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's award is final, for in reality it would almost never be final." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). Expert labor arbitrators are best equipped to understand the custom and practices of a particular factory or a particular industry. *Id.* at 596. As stated earlier, Congress established three narrow bases for review in deference to the parties and expert arbitrators. *Sheehan*, 439 U.S. at 91. The *Sheehan* Court emphasized that "[o]nly upon one or more of *these bases* may a court set aside an order of the Adjustment Board." *Id.* at 93 (emphasis added). RLA standards for review are purposefully designed to be "among the narrowest known to the law." *Id.* at 91.[9]

Resolution 49 (1990). *See generally Cleared for Takeoff* (McKelvey ed. 1988) (citing Part 6, Handling of Minor Disputes).

[9] Procedural and evidentiary questions are particularly within the purview of the Board or arbitrator. *See United Paperworkers, Int'l Union v. Misco, Inc.*, 484 U.S.29, 40 (1987) (reviewing procedural or evidentiary rulings which grow out of the dispute

The precedent in some courts of appeals permitting review of arbitrator awards on "due process" grounds undermines the practical finality of adjustment board awards and prolongs the underlying labor relations dispute by encouraging the unsuccessful party to seek court review. *Sheehan*, 439 U.S. at 94. The Railway Labor Act does not provide for court review of adjustment board awards on "due process" grounds. Instead, Section 3 of the Act provides due process through its operative provisions and the procedures and the practices of the boards and the collective agreements that implement the statute.[10] This reflects the special character of adjustment boards. They are established and conducted by labor and management. These boards normally consist of lay representatives on both sides and neutrals who are not required to have legal training.[11]

The arbitral task of adjustment boards is to apply agreements to day-to-day workplace disputes and to follow specific procedures set out in the Act and the applicable labor agreements, along with the rules and practices of the adjustment board. The parties to these proceedings are not strangers to one another.

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and bear on its final disposition is limited to bad faith or misconduct). The lower court's detailed parsing of the Board precedent relied on by the NRAB in making its award illustrates this confusion of roles.

[10] *See* Buck Belcher & Stephen Wichern, *Judicial Review under the Railway Labor Act: Are Due Process Claims Permissible?*, 33 Transp. L.J. 197 (2006).

[11] Because it is composed of representatives of the parties to the disputes that come before it, the NRAB has been held to be exempt from the Administrative Procedure Act, except for its disclosure provisions, 5 U.S.C. §§ 551 et seq.. *See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639 (6th Cir. 1986); *Kotakis v. Elgin, Joliet & E. Ry.*, 520 F.2d 570 (7th Cir. 1975).

They have had almost a century's experience establishing a form of self-governance that has worked effectively. In the NRAB arbitration proceeding at issue, it was well known that the NRAB functions as an appellate body that relies on the "on the property record" and that the occurrence of a "conference" between the parties must be established in the submission to the Adjustment Board. The introduction of elusive concepts of arbitral "due process" to the grievance-arbitration procedures and adjustment board awards is simply an invitation for a losing party to take another bite at the same apple.

The proliferation of litigation over grievance-arbitration disputes is a major concern to the employers in both the railroad and airline industries. Added litigation will diminish the authority of adjustment boards and prolong the disruptive effects of unresolved grievances. It is timely and important to grant the petition for a writ of certiorari and address the ongoing conflict among the courts of appeals.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 5, 2008

JOINT
APPENDIX

Supreme Court, U.S.
FILED
MAY 26 2009
OFFICE OF THE CLERK

⑪

No. 08-604

In the
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Page

United States Court of Appeals for the Seventh Circuit, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, No. 06-2542 .... JA-1

United States District Court for the Northern District of Illinois, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, No. 1:05-cv-02401 .... JA-7

Brief and Required Short Appendix of Plaintiff-Appellant, Brotherhood of Locomotive Engineers and Trainment, General Committee of Adjustment, Central Region, No. 06-2542 (7th Cir. Sept. 20, 2006) (excerpts) JA-19

Award No. 18679 of the National Railroad Adjustment Board dated April 8, 1958 (7th Cir. Supplemental Appendix 97) JA-40

Award No. 12475 of the National Railroad Adjustment Board dated November 4, 1992 (7th Cir. Supplemental Appendix 102-04) JA-42

Award No. 12517 of the National Railroad Adjustment Board dated March 3, 1993 (7th Cir. Supplemental Appendix 98-101) JA-47

Award No. 4931 of the National Railroad Adjustment Board dated September 22, 1994 (7th Cir. Supplemental Appendix 127-30) JA-52

Award No. 30821 of the National Railroad Adjustment Board dated April 27, 1995 (7th Cir. Supplemental Appendix 112-13) JA-57

Award No. 33916 of the National Railroad Adjustment Board dated January 24, 2000 (7th Cir. Supplemental Appendix 105-06) JA-59

ITEMS PREVIOUSLY PRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the Appendix to the Petition for Writ of Certiorari filed on November 5, 2008 by Petitioner in Case No. 08-604.

Opinion of the United States Court of Appeals for the Seventh Circuit, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, 522 F.3d 746 (7th Cir. Apr. 9, 2008) 1a

Opinion of the United States District Court for the Northern District of Illinois, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of*

Adjustment v. Union Pacific Railroad Co., 432 F. Supp. 2d 768 (N.D. Ill. May 15, 2006) 24a

Order of the United States Court of Appeals for the Seventh Circuit Denying Petition for Rehearing and Rehearing En Banc, *Brotherhood of Locomotive Engineers & Trainmen, General Committee of Adjustment v. Union Pacific Railroad Co.*, 537 F.3d 789 (7th Cir. Aug. 11, 2008) 43a

U.S. Constitution amendment V 47a

45 U.S.C. § 151a 48a

45 U.S.C. § 152 Second 49a

45 U.S.C. § 153 First (a), (h), (i), (j), (*l*), (m), (q), Second 50a

29 C.F.R. § 301.1(b) 58a

29 C.F.R. § 301.2(a) 59a

29 C.F.R. § 301.3 ....60a

29 C.F.R. § 301.4 ....61a

29 C.F.R. § 301.5(d), (e) 62a

29 C.F.R. § 301.7 ....63a

29 C.F.R. § 301.8 ....64a

Awards of the National Railroad Adjustment Board (Mar. 15, 2005)

Award No. 26089 (7th Cir. Supplemental Appendix 14-19) 65a

Award No. 26090 (7th Cir. Supplemental Appendix 22-27) 73a

Award No. 26092 (7th Cir. Supplemental Appendix 35-40) 81a

Award No. 26093 (7th Cir. Supplemental Appendix 43-48) 89a

Award No. 26094 (7th Cir. Supplemental Appendix 51-56) 97a

Labor Members' Dissent to Awards Nos. 26089, 26090, 26092, 26093 & 26094 .... 105a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Seventh Circuit
No. 06-2542

6/5/06	Private civil case docketed. [06-2542] [1992570-1] Transcript information sheet due 6/15/06. Appellant's brief due 7/17/06 for Brohd Engineers & Tr. (hudk)

* * *

6/5/06	Filed Appellant Brohd Engineers & Tr docketing statement. [06-2542] [1992578-1] (hudk)

* * *

6/20/06	ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1992570-1] SCO [06-2542] 1. Appellant's brief due 8/25/06 for Brohd Engineers & Tr. 2. Appellee's brief due 9/25/06 for Union Pacific. 3. Appellant's reply brief due 10/10/06 for Brohd Engineers & Tr. (hudk)
6/26/06	Original record on appeal filed. Contents of record: 1 vol. pleadings. [06-2542] [1998833-1] (bria)
7/26/06	ORDER: Pursuant to Circuit Rule 33, briefing in this appeal is SUSPENDED pending further court order. [2009120-1] SCO [06-2542] (kell)

8/10/06	ORDER: Pursuant to Circuit Rule 33, briefing will proceed as follows: [1992570-1] SCO [06-2542] 1. Appellant's brief due 9/20/06 for Brohd Engineers & Tr. 2. Appellee's brief due 10/27/06 for Union Pacific. 3. Appellant's reply brief due 11/13/06 for Brohd Engineers & Tr. (hudk)
9/20/06	Filed 15c appellant's brief by Brohd Engineers & Tr. Disk filed. [06-2542] [0-0] (sand)

* * *

10/30/06	Filed 15c appellee's brief by Union Pacific. Electronically Transmitted. [06-2542] [0-0] (odea)
10/30/06	Filed 10c appendix by Appellee Union Pacific. [06-2542] [2040661-1] (odea)
11/13/06	Filed 15c appellant's reply brief by Brohd Engineers & Tr. Disk filed. [06-2542] [0-0] (josh)

* * *

12/26/06	ORDER: Argument set for Wednesday, February 7, 2007 at 10:30 a.m. Each side limited to 10 minutes. [06-2542] [2058833-1] (trot)
1/9/07	Added attorney Thomas H. Geohegan for purposes of oral argument per filing of oral argument telephone confirmation

	form for Appellant Brohd Engineers & Tr. [06-2542] [1992570-1] (kare)

* * *

1/22/07	Oral argument confirmation card filed by attorney Donald J. Munro for Appellee Union Pacific. [06-2542] [1992570-1] (kare)
2/7/07	Case heard and taken under advisement by panel: Circuit Judge Joel M. Flaum, Circuit Judge Ilana D. Rovner, Circuit Judge Terence T. Evans. [06-2542] [2072819-1] (kare)
2/7/07	Case argued by Thomas H. Geoghegan for Appellant Brohd Engineers & Tr, Donald J. Munro for Appellee Union Pacific. [06-2542] [1992570-1] (kare)
4/9/08	Filed opinion of the court by Judge Rovner. REVERSED. Circuit Judge Joel M. Flaum, Circuit Judge Ilana D. Rovner, Circuit Judge Terence T. Evans. [06-2542] [1992570-1] (mank)
4/9/08	ORDER: Final judgment filed per opinion. With costs: y. [06-2542] [2205479-1] (mank)
4/23/08	Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Union Pacific. Dist. [06-2542] [2210163-1] (amyd)

4/24/08	Sent clerk's copy of request to Appellant Brohd Engineers & Tr requesting 30c of their Answer to the Petition for Rehearing and Petition for Rehearing Enbanc filed by the Appellee on 4/23/08. [06-2542] [2210504-1] Answer to Petition for Enbanc Rehearing due 5/8/08 for Brohd Engineers & Tr. (amyd)
5/14/08	Filed instanter motion by Appellant Brohd Engineers & Tr to file answer to appellee's Petition for Rehearing and Rehearing En Banc. [2216930-1] 30c tendered. [0-0] [06-2542] (amyd)
5/16/08	ORDER issued GRANTING instanter motion to file answer to Petition for Rehearing. [2216930-1] The clerk of this court is directed to file instanter the tendered copies of the appellant's answer to petition for rehearing en banc. [2210163-1] JKL [06-2542] (amil)
5/16/08	Filed 30c Answer of Appellant Brohd Engineers & Tr to Petition for Rehearing and Petition for Rehearing Enbanc, per order Dist. [06-2542] [2218698-1] (amyd)
8/11/08	Opinion filed DENYING Appellant Brohd Engineers & Tr Petition for Rehearing and Petition for Rehearing Enbanc. Chief Judge Frank H. Easterbrook, concurring, Circuit Judge Richard A. Posner, concurring, Circuit Judge Joel M. Flaum, Circuit Judge

	Kenneth F. Ripple, Circuit Judge Michael S. Kanne, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood, Circuit Judge Terence T. Evans, Circuit Judge Ann C. Williams, Circuit Judge Diane S. Sykes, Circuit Judge John D. Tinder. [06-2542] [2210163-1] (mank)
8/15/08	Filed motion by Appellee Union Pacific to stay the mandate. [2238466-1] [06-2542] (keli)
8/21/08	ORDER re: Union Pacific's motion to stay mandate pending filing and disposition of a petition for writ of certiorari, filed on 8/15/08. The motion is DENIED. If appellee wants to stay proceedings in the district court, it should file the appropriate motion in that court. [2238466-1] [06-2542] (fern)
10/29/08	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings.) [06-2542] [2216930-1] (cove)
10/30/08	Filed mandate receipt. [06-2542] [2244231-1] (leti)
11/7/08	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 08-604. [06-2542] [2244679-1] (mank)

3/2/09	Filed order from the Supreme Court GRANTING leave to file a brief as Amici Curiae is GRANTED. The Petition for Writ of Certiorari is GRANTED. Supreme Court Case No.: 08-604. [06-2542] [2247830-1] (fern)

RELEVANT DOCKET ENTRIES

U.S. District Court for the Northern District of Illinois
Case No. 1:05-cv-02401

Date Filed	#	Docket Text
04/22/2005	1	PETITION filed by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region. (jmm,) (Entered: 04/26/2005)
		* * *
04/22/2005	3	ATTORNEY Appearance for Plaintiff Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region by Thomas Howard Geoghegan, Carol Tran Nguyen. (jmm,) (Entered: 04/26/2005)
04/27/2005	5	MINUTE entry before Judge Mark Filip : Status hearing set for 6/15/2005 at 09:30 AM. and parties are to report the following: (1) Possibility of settlement in the case; (2) If no possibility of settlement exists, the nature and length of discovery necessary to get the case ready for trial. Plaintiff is to advise all other parties of the courts action herein. Lead counsel is directed to appear at this status hearing. Parties

		to prepare and submit a joint status report within two days prior to status. (See Judges web page for status report) Judicial staff mailed notice (tbk,) (Entered: 04/27/2005)
04/27/2005	6	SUMMONS Issued, original and one copy as to Defendants Union Pacific Railroad, National Railroad Adjustment Board. (jmm,) (Entered: 05/02/2005)
05/03/2005	7	SUMMONS Returned Executed by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region as to National Railroad Adjustment Board on 5/3/2005, answer due 5/23/2005. (jmm,) (Entered: 05/10/2005)
05/03/2005	8	SUMMONS Returned Executed by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region as to Union Pacific Railroad on 4/27/2005, answer due 5/17/2005. (jmm,) (Entered: 05/10/2005)
05/13/2005	9	AGREED MOTION by Defendant Union Pacific Railroad to extend time. (rbf,) (Entered: 05/16/2005)

* * *

05/16/2005	11	MINUTE entry before Judge Mark Filip : Defendant, Union Pacific

		RR.Company's agreed motion 9 to extend time to file responsive pleading is granted to and including 6/17/05. Telephoned notice (jmm,) (Entered: 05/18/2005)
05/23/2005	13	SUMMONS Issued, two originals and two copies as to AUSA and Attorney General. (jmm,) (Entered: 05/26/2005)
06/13/2005	16	JOINT STATUS Report by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region. (jmm,) (Entered: 06/22/2005)
06/15/2005	14	MINUTE entry before Judge Mark Filip: Status hearing held on 6/15/2005. Plaintiff's oral motion for leave to file an amended complaint on or before 6/22/05 is granted. Status hearing set for 6/24/2005 at 09:30 AM.No notice(tbk,) (Entered: 06/15/2005)

* * *

06/21/2005	19	NOTICE by plaintiff of dismissal of defendant National Railroad Adjustment Board. (jmm,) (Entered: 06/27/2005)
06/22/2005	17	MINUTE entry before Judge Mark Filip : Plaintiff's Notice of Dismissal, pursuant to Rule 41(a)(1)(i), voluntarily dismissing defendant

		National Railroad Adjustment Board from this action is GRANTED and SO ORDERED. Mailed notice (jmm,) (Entered: 06/23/2005)
06/24/2005	18	MINUTE entry before Judge Mark Filip : Status hearing held on 6/24/2005. Set deadlines as to motion to dismiss filed instanter: Responses due by 8/15/2005 and Replies due by 8/29/2005. Ruling on motion to dismiss will be by mail. No notice (tbk,) (Entered: 06/24/2005)
06/24/2005	20	MOTION by Defendant Union Pacific Railroad to dismiss. (jmm,) (Entered: 07/05/2005)
06/24/2005	21	MEMORANDUM OF POINTS by defendant Union Pacific Railroad and authorities in support of motion to dismiss 20 . (jmm,) (Entered: 07/05/2005)

* * *

08/15/2005	23	MOTION by Plaintiff to file instanter its opposition to defendant's motion to dismiss (Attachments: # 1 Memorandum)(gma,) (Entered: 08/17/2005)

* * *

08/22/2005	25	UNCONTESTED MOTION by Defendant Union Pacific Railroad to amend briefing schedule regarding

defendant's motion to dismiss. (lcw,) (Entered: 08/23/2005)

* * *

08/23/2005	27	MINUTE entry before Judge Mark Filip : MOTION by Plaintiff Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region to file response instanter 23 is granted. MOTION by Defendant Union Pacific Railroad to amend briefing schedule 25 is granted. MOTION by Defendant Union Pacific Railroad to dismiss 20 is taken under advisement. Response is due by 8/25/2005. Reply is due by 9/19/2005. Court will rule by mail. Telephone notice (jms,) (Entered: 08/23/2005)
08/23/2005	29	MEMORANDUM of Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region in Opposition to defendant's motion to dismiss 20. (jmm,) (Entered: 09/28/2005)
09/19/2005	28	REPLY MEMORANDUM by Defendant Union Pacific Railroad in further support of motion to dismiss. (jmm,) (Entered: 09/22/2005)

01/23/2006	31	EXECUTIVE COMMITTEE ORDER: Case reassigned to Judge Virginia M. Kendall for all further proceedings. Signed by Executive Committee on 1/23/06. Mailed notice (cem,) (Entered: 01/26/2006)
01/24/2006	30	MINUTE entry before Judge Virginia M. Kendall : Initial status hearing set for 2/8/06 at 10:30 a.m. before Judge Kendall in Courtroom 1719. By 2/1/06, counsel are directed to confer, prepare, and file a Joint Status Report as directed in the Order Requiring Status Report and Setting Status Hearing for Newly Assigned Cases to the Calendar of Judge Kendall. Mailed notice (gmr,) (Entered: 01/25/2006)
02/09/2006	32	MINUTE entry before Judge Virginia M. Kendall: At the parties' request, initial status hearing reset to 3/1/2006 at 10:30 AM. By 2/15/06, counsel are directed to confer, prepare, and file a Joint Status Report as directed in the Order Requiring Status Report and Setting Status Hearing for Newly Assigned Cases to the Calendar of Judge Kendall. Mailed notice (gmr,) (Entered: 02/09/2006)
02/15/2006	33	STATUS Report by Brotherhood of Locomotive Enginneers and

		Trainmen, General Committee of Adjustment, Central Region (Nguyen, Carol) (Entered: 02/15/2006)
02/15/2006	34	STATUS Report by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region (Nguyen, Carol) (Entered: 02/15/2006)

* * *

03/01/2006	36	MINUTE entry before Judge Virginia M. Kendall: Status hearing held and continued to 04/17/2006 at 09:00 AM. Ruling on pending motion(s) will be by mail 20 . Mailed notice (ar,) (Entered: 03/03/2006)
04/17/2006	37	MINUTE entry before Judge Virginia M. Kendall : Status hearing held and continued to 5/17/2006 at 09:00 AM. Mailed notice (gmr,) (Entered: 04/17/2006)
05/15/2006	39	MINUTE entry before Judge Virginia M. Kendall: For the reasons set out in the Memorandum Opinion and Order, defendant's motion to dismiss 20 is granted. The Court enters judgment in favor of Defendant Union Pacific Railroad and against Plaintiff Brotherhood of Locomotive Engineers and

		Trainmen, General Committee of Adjustment, Central Region. Any pending dates, motions, or schedules in this case are terminated as moot. Terminate civil case. Civil case terminated. Mailed notice (ar,) (Entered: 05/17/2006)
05/15/2006	40	MEMORANDUM Opinion and Order, signed by Judge Virginia M. Kendall on 5/15/2006 39. Mailed notice(ar,) (Entered: 05/17/2006)
05/15/2006	41	ENTERED JUDGMENT. Mailed notice(ar,) (Entered: 05/17/2006)
05/16/2006	38	MINUTE entry before Judge Virginia M. Kendall: At the direction of the Court, status hearing set for 5/17/06 is stricken. Mailed notice (gmr,) (Entered: 05/16/2006)
06/02/2006	42	NOTICE of appeal by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Region regarding orders 41 , 39 , 40 ; Filing fee $ 455.00 paid; Receipt number 10426264 (dj,) (Entered: 06/05/2006)
06/05/2006	43	TRANSMITTED to the 7th Circuit the short record on 6/5/06 notice of appeal 42 . Notified counsel (dj,) (Entered: 06/05/2006)
06/06/2006	44	ACKNOWLEDGEMENT of receipt of short record on appeal regarding

		notice of appeal 42 ; USCA Case No. 06-2542 (ar,) (Entered: 06/08/2006)
06/21/2006	46	USCA RECEIVED on 6/21/06 the long record on appeal (06-2542). (dj,) (Entered: 06/23/2006)
06/22/2006	45	TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 42 (USCA no. 06-2542) consisting of 1 volume of pleadings. (dj,) (Entered: 06/22/2006)
10/22/2008	47	MOTION by Plaintiff to vacate awards and remand cases to NRAB Panel and enter final judgment. (Nguyen, Carol). (Text edited by Clerk's Office.) Modified on 10/23/2008 (ar,). (Entered: 10/22/2008)

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10/27/2008	49	OBJECTIONS by Defendant to Plaintiff's motion to vacate and notice of hearing 47 . (Cushing, Thomas). (Text edited by Clerk's Office.) Modified on 10/28/2008 (ar,). (Entered: 10/27/2008)
10/27/2008	50	Proposed ORDER SUSTAINING UNION PACIFICS OBJECTION by Union Pacific Railroad (Cushing, Thomas) (Entered: 10/27/2008)
10/27/2008	51	MOTION by Defendant Union Pacific Railroad to stay *Proceedings*

		Pending Disposition of a Petition for Writ of Certiorari (Cushing, Thomas) (Entered: 10/27/2008)
10/27/2008	52	MEMORANDUM by Union Pacific Railroad in support of motion to stay 51 *Proceedings Pending Disposition of a Petition for Writ of Certiorari* (Attachments: # 1 order denying rehearing, # 2 order denying stay)(Cushing, Thomas) (Entered: 10/27/2008)
10/29/2008	53	MINUTE entry before the Honorable Virginia M. Kendall: Plaintiff's motion to vacate awards and remand cases to NRAB and enter final judgment 47 is withdrawn telephonically as the mandate has not issued from the 7th Circuit. Mailed notice (jms,) (Entered: 10/29/2008)
10/29/2008	56	OPINION from the USCA for the 7th Circuit: Argued 02/07/07, Decided 04/09/08 in USCA case no. 06-2542. (ar,) (Entered: 10/31/2008)
10/29/2008	57	JUDGMENT-with oral argument of USCA dated 04/09/08 regarding notice of appeal 42 , USCA No. 06-2542: "The judgment of the District Court is reversed, with costs, in accordance with the decision of this court entered on this date." (ar,) (Entered: 10/31/2008)

10/29/2008	58	LETTER from the Seventh Circuit returning the record on appeal in USCA no. 06-2542 consisting of one volume of pleadings. (ar,) (Entered: 10/31/2008)
10/31/2008	54	MOTION by Plaintiff to vacate awards and remand cases to NRAB Panel and Enter Final Judgment. (Geoghegan, Thomas). (Text edited by Clerk's Office.) Modified on 11/3/2008 (ar,). (Entered: 10/31/2008)

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11/04/2008	60	MOTION by Defendant Union Pacific Railroad to stay *Amended Motion to Stay District Court Proceedings Pending Disposition of Petition for Writ of Certiorari that will be Filed with the Supreme Court on November 5, 2008* (Cushing, Thomas) (Entered: 11/04/2008)
11/07/2008	61	RESPONSE by Brotherhood of Locomotive Enginneers and Trainmen, General Committee of Adjustment, Central Regionin Opposition to MOTION by Defendant Union Pacific Railroad to stay *Amended Motion to Stay District Court Proceedings Pending Disposition of Petition for Writ of Certiorari that will be Filed with the Supreme Court on November 5, 2008* 60 (Geoghegan, Thomas) (Entered:

11/07/2008)

* * *

11/10/2008	63	MINUTE entry before the Honorable Virginia M. Kendall: Motion hearing held on 11/10/2008. Defendant's motion to stay 51 , Plaintiff's motion to vacate awards, remand cases, and enter final judgment 54 and Defendant's motion to stay amended motion to stay 60 are taken under advisement. Ruling will be by mail. Mailed notice by judge's staff. (srb,) (Entered: 11/10/2008)
02/24/2009	64	STATUS Report by Union Pacific Railroad (Cushing, Thomas) (Entered: 02/24/2009)
03/13/2009	65	MINUTE entry before the Honorable Virginia M. Kendall: Because the Supreme Court will be addressing the dispositive issue in this matter, and by agreement of the parties, this case is stayed. The motions to stay [51 and 60] are granted. Mailed notice (jms,) (Entered: 03/13/2009)

No. 06-2542

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, GENERAL COMMITTEE OF ADJUSTMENT,
CENTRAL REGION,

Plaintiff/Appellant

v.

UNION PACIFIC RAILROAD, CO.,

Defendant/Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 05 C 2401

The Honorable Virginia M. Kendall

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT, BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION

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* * *

II. STATEMENT OF THE ISSUES

1. Whether a panel of the NRAB denied procedural due process to the Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Organization") when the NRAB panel dismissed these five cases with prejudice under a purported but never previously announced procedural rule applied for the first time without prior notice that "evidence" of the conferencing of such cases must be in the "on site property record" and could not be considered or introduced later to show the parties conferred about the cases, when (1) there is no such procedural rule in the NRAB's rules and regulations, as set out in Circular One which is codified in 29 C.F.R. Part 301, (2) the NRAB panel had no authority to create and apply such a new procedural rule to dismiss these cases with prejudice and without reaching the merits, (3) even if it had such authority, it could not create and apply such a new procedural rule without prior notice to the parties, (4) the Organization could and did offer convincing evidence that the parties had conferenced, and (5) there would have been no prejudice to any party by the consideration of the evidence that the parties had met in conference.

2. Whether the same panel of the NRAB unlawfully exceeded its jurisdiction under the Railway Labor Act ("RLA" or "Act") and failed to "conform, or confine itself, to matters within the scope of the division's jurisdiction" by adopting and applying without prior notice a new procedural rule to dismiss the five cases with prejudice when (1) such a new procedural rule is not required or authorized by the RLA, by Circular One, or by the collective bargaining

agreement ("CBA") and (2) the NRAB panel had no authority to adopt and apply such a new procedural rule without notice to the parties or to impose the sanction of dismissing these cases with prejudice without a decision on the merits under the CBA.

3. Whether the same panel of the NRAB unlawfully permitted Union Pacific, Co. ("Carrier") to raise the objection as to lack of evidence of conferencing in the "on-property" record when the Carrier failed to raise the argument in its original submission in violation of Circular One which is codified in 29 C.F.R. Part 301.

III. STATEMENT OF CASE

On April 22, 2005 the Plaintiff-Appellant Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "Organization") filed suit to vacate five NRAB First Division awards that dismissed five cases for "lack of jurisdiction." The NRAB First Division awards 26089, 26090, 26092, 26093, and 26094 were issued on March 15, 2005. See Short Appendix. The five awards dismissed, with prejudice, the cases of five discharged locomotive engineers, with no decision on the merits. The discharges occurred in 2002 and 2003. In all five cases, which had been consolidated, the Neutral Member and the Carrier representative held that the cases should be dismissed with prejudice for lack of "jurisdiction" because the "on-site property" record contained no evidence (such as a letter or memo) that the parties had met in conference about these cases prior to their submission to arbitration by the NRAB. The Organization filed dissents in all five awards.

The Organization then filed a three-count complaint to vacate the five awards dismissing the cases with prejudice. The Organization alleged that the NRAB panel had denied it the "procedural due process" required under the RLA. It alleged that the NRAB had imposed a new procedural rule, without prior notice to the parties. The NRAB panel's new procedural rule required that the Organization could only prove or show that the parties had met in conference by putting documents relating to these conferences in the "on-property" record prior to filing the "letter of intent" to arbitrate and in no other way. According to the NRAB, this procedural rule was "jurisdictional," and this new procedural rule barred the Organization from proving conferencing in any other way. No prior award by the NRAB had ever held that this method was the one and only way to prove "conferencing." The Organization alleged that the NRAB unlawfully denied the Organization the right to submit uncontested documentary evidence that such conferences had occurred in these cases, and that the NRAB unlawfully had allowed the Carrier to raise this objection to "jurisdiction" after the Carrier had participated with full knowledge of this matter in the arbitration hearings.

Furthermore, the Organization alleged that by adopting this new procedural rule, the NRAB panel had failed to "conform, or confine itself, to matters within the scope of the division's jurisdiction." The Organization alleged that the NRAB panel had unlawfully adopted and applied a new rule to dismiss these cases with prejudice and without a decision on the merits when it had no authority to adopt and apply such a rule under the RLA, or Circular One, or the CBA. The Organization alleged that in the absence of such a rule in the Act or Circular One or the CBA and without prior notice, the NRAB panel had exceeded its proper jurisdiction in applying such a rule and dismissing the cases. Finally, the Organization alleged that conferencing prior to arbitration was not even required in these cases because the parties' CBA did not provide for or require the parties to meet and confer prior to arbitration though the parties had in fact done so in these cases.

The defendant Carrier then filed a Rule 12(b)(6) motion to dismiss for failure to state a claim on the face of the complaint. Nonetheless, the Carrier's motion disputed the allegation that the Organization had no prior notice of the new procedural rule, and to make this point, the Carrier attached various NRAB awards that held (1) conferencing prior to arbitration was required, and (2) that in a certain number of NRAB awards, the panels had refused to consider "new" evidence which had not been in the "on-property" record below, though the "new" evidence in these cases had concerned the merits of the dispute and not information about a procedural step such as conferencing.

On May 16, 2006, the District Court entered an order dismissing the case for failure to state a claim under Rule 12(b)(6) as to all three counts. As to Counts II and III, the District Court acknowledged that the NRAB awards attached to the defendant Carrier's motion to dismiss did not hold that conferencing could be proved only in the "on-property" record and that the Organization's arguments were "well taken." (R 40, p. 14) However, the District Court found that it was "clear" that the NRAB panels did not consider evidence outside the "on-property" record and that the cases had to be dismissed even if there was persuasive documentation offered by the Organization that conferencing had occurred. (R 40, p. 13) The District Court also held that the Carrier here had not waived its right to object because it was "clear" that a party can raise "lack of jurisdiction" at any time, even if the Carrier here had failed to argue at the outset that the "on-property" record did not have any documentation as to conferencing. (R 40, p. 15)

The Organization then timely filed this appeal on June 5, 2006. The Organization does not challenge the dismissal of Count I but only challenges the dismissal of Count III (the NRAB's denial of procedural due process), and Count II (the NRAB's failure to act within the scope of its jurisdiction.)

* * *

VI. ARGUMENT

A. This Court May Review De Novo the Decision of the District Court Granting the Defendant's Motion to Dismiss Under Rule 12(b)(6).

When a case has been dismissed under Rule 12(b)(6), this Court may review "de novo" the decision of the District Court. At this early pleading stage, the complaint should be sustained if there is any set of facts on which plaintiff may prevail; and the allegations of the complaint are interpreted in the light most favorable to plaintiff. *Conley v. Gibson*, 355 U.S.41, 24-46 (1957); *Cody v. Harris*, 609 F.3d 853, 857 (7th Cir. 2005); *Baker v. Kingsley*, 387 F.3d 659, 664 (7th Cir. 2004). It is important to emphasize this last point since the District Court did not confine its review to the allegations of the complaint. Rather, as to Counts III and II which are the basis of this appeal, the District Court made conclusions and observations about NRAB practice which come from a tiny fraction of the countless NRAB awards. These awards are not even legal precedents or binding on the parties. Nor do they authoritatively establish NRAB practice.

B. The NRAB Panel Majority Denied Procedural Due Process When It Dismissed These Five Cases Under a Purported New But Never Previously Announced Procedural Rule That Conferencing Must Be Proved Only in the "on-property" Record When: (1) There is No Such Rule in the NRAB's Rules and Regulations, and There Is No Prior NRAB Award Announcing or Applying Such a Rule; (2) the Panel Had No Authority to Adopt and Apply such a New Procedural Rule; (3) Even If It Had Such Authority, this NRAB Panel Could Not Apply Such a Rule Without Prior Notice; (4) the Organization Had No Such Prior Notice or Any Notice At All; (5) the Organization Could and Did Offer Persuasive Evidence That the Conferences Occurred; and (6) There Would Have Been No Prejudice to Any Party By the Consideration of the Evidence That the Conferences Occurred.

In this Circuit, the federal courts may review and vacate NRAB awards when an NRAB panel has denied procedural due process. *Pokuta v. Trans World Airlines*, 191 F.3d 834, 839 (7th Cir. 1999); *Bates v. Baltimore & Ohio R.R. Co.*, 9 F.3d 29, 31 (7th Cir. 1993); *Morin v. Consolidated Rail Corp*, 810 F.2d 720, 722 (7th Cir. 1987); *Steffens v. BRAC*, 797 F.2d 442, 448 and n.5 (7th Cir. 1986). In these five cases, the NRAB panel did deny due process to the Organization when it applied a new procedural rule to dismiss all five cases and did so without prior notice. *Wells*, 498 F.2d at 917. It is axiomatic that an administrative agency, including the NRAB, should inform litigants of procedural requirements they have to meet. *Wells*, 498 F.2d at 917; *see, Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973). The parties did confer. The Organization has "convincing" documentation. There was never a procedural rule in the RLA or Circular One or the CBA that required the parties to put documents as to conferencing in the "on-property" record. The "jurisdiction" of a NRAB panel is not conditioned on such a method of proof. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted). There is no "fundamental" fairness or "meaningful" opportunity for a hearing if no one knows the rules or new rules can be made up and applied without notice. Indeed, the panel's new procedural "rule" is not even a valid "rule," for there is no such rule in Circular One which is codified in 29 C.F.R. Part 301 which contains all the procedural rules of the NRAB. Nor is there any authority for the new procedural rule in the RLA, at least not for the purposes of limiting the NRAB's statutory jurisdiction. Nor is there any authority for such a rule in the CBA, which is the only other legal source for "jurisdictional" limits - such as time limits for filing grievances. Even if this NRAB panel had authority to adopt this new procedural rule to limit its statutory "jurisdiction" in this novel way, it could not apply it here in these cases without prior notice or publication to the parties.

Furthermore, the panel had before it "convincing" evidence that the parties met in conference; indeed, on this Rule 12(b)(6) motion, it is undisputed the conferences occurred. Astonishingly, the panel treated all this documentation as irrelevant. At no point did the panel majority deny that the conferences had occurred – since there was ample proof of it - but said it would not accept or look at such documentation, "no matter how convincing." The NRAB majority claimed that in these cases and from now on, the fact of conferences must be proved only by a document in the "on-property" record and in no other way.

The "on-property" record which is transmitted to the NRAB is intended to be the record of all the evidence relating to the *merits* of the dispute, whether it be a discharge or discipline. That is why the "on-property" record is usually but not always closed when it is transmitted to the NRAB at the start of the arbitration. While the "on-property" record transmitted to the NRAB may have one or more documents which refer to a post-hearing conference, there is no consistent practice or rule to that effect, contrary to the view of the District Court. In any case, such documentation is information relating to a post-hearing procedural step that is not related to the underlying merits or the Superintendant's decision which the Panel is to review.

Here the panel did not even begin to suggest why the Carrier would be prejudiced by the receipt of the Organization's evidence – especially since the Carrier did not deny the conferences had failed to occur but only that the evidence of it was not in the "on-property" record. As noted by the Dissent in these cases, this is the kind of "gamesmanship" that brings the NRAB into disrepute.

Such "gamesmanship," this Circuit has held, also denies procedural due process. In *Wells*, this Circuit held that the NRAB denies due process when it applies a new procedural rule without prior notice to the parties. *Wells*, 498 F.2d at 917. In *Wells* an NRAB panel refused to accept the carrier's brief as timely and "clarified" a procedural point to hold that the "postmark" date but not the "postage meter" date would now determine timeliness of a filing. This Circuit held that adoption of this new procedural rule was a denial of due process when there was not prior notice or publication to the Carrier. As this Circuit stated in *Wells* at pages 917-918:

> "The Division had no rule at that time adopting a United States postmark as the criterion for determining the timeliness of a request or tender. It was not until June 5, 1970, nearly two years after defaulting plaintiff, that such a rule or policy was adopted. Such new rule or policy was not made public and the evidence was that plaintiff had no knowledge of it...
>
> Even more indicative of the unfairness of this review by the Division is the lack of prejudice that would have resulted if it had granted the extension or at least have permitted plaintiff *an opportunity to make a its showing...*" (emphasis supplied).

The procedural unfairness here is similar to and worse than in *Wells*. Here, as in *Wells*, there was no prior rule or consistent standard - in this case, a rule that conferences may be proved only by documentation in the "on-property" record and by no other means. As noted, there is no such rule in the published rules of Circular One. *See* 29 C.F.R. Part 301. Circular One contains the only published rules and regulations ever issued by the NRAB. There is no such rule in the CBA either. As in *Wells* there was no notice or publication of a new rule, so that the Organization might have a reasonable opportunity to comply and obtain a hearing on the merits of these important cases.

Furthermore, in *Wells* the Circuit emphasized the "lack of prejudice" to any party if the NRAB were to accept the late filing of the Carrier's brief or let the Carrier at least give a reason for it. Here the "lack of prejudice" is even more striking than in *Wells*. After all, the NRAB panel here does not even dispute the conferences occurred! Consideration of the Organization's evidence as to the procedural step would not be unfair or prejudicial or cause surprise to the Carrier. Indeed, as set out in the complaint and argued below, the Carrier is well aware that the conferences occurred. The Carrier was in the conferences. That is why the Carrier originally failed to object as to lack of conferencing when the Organization initiated these arbitrations. It is why the Carrier continued to be silent when it filed with the NRAB its original submission of "all relevant arguments" and "facts" as required to do so under Circular One. See 29 C.F.R. 301.5. When the objection came at last, it was artfully couched so as not to deny that the conferences had in fact occurred. (That would have constituted a fraud upon the Board, and the Carrier was careful not to push its point too far.) Obviously there is no prejudice to the Carrier from accepting the Organization's evidence that the conferences occurred, since the Carrier is not able and cannot ethically dispute that the parties did comply with this procedural step.

In dismissing the procedural due process claim, the District Court gave reasons which were based at least in part on "findings" from a tiny fraction of past NRAB awards. Furthermore, the awards are not "precedents" for there is no "stare decisis" in NRAB proceedings, as pointed out even in one of the awards cited by the District Court. (R. 21, Ex. B, p. 57 of 103) Nor do these few awards authoritatively establish NRAB practice. The District Court acknowledged that there has not been a prior NRAB award that specifically *requires* the Organization to prove conferencing only by documents in the "on-property" record and no other way. If there were such an award, it would still not serve as "precedent" or be binding, as a rule in Circular One is binding. Even so, there has been no such prior award.

While acknowledging that there is no direct precedent for the NRAB's action in these five cases and while acknowledging that the Organization's arguments as to lack of due process were "well taken," the District Court made two findings or quasi-findings. (R. 40, p. 14) First, the District Court stated, erroneously, that it is "clear" the NRAB does not take "new evidence" outside the "on-property" record. (R. 40, p. 12-15)

In fact it is not "clear." First of all, as the District Court acknowledged, this "rule" as to new evidence is one which previously has been used only for new evidence relating to the "merits" of the case. (R. 40, p. 12-15) Typically *but not always*, evidence as to the merits is limited to the evidence in the "on-property" record. This is the evidence which the Superintendant would have considered in deciding whether to impose discharge or discipline. It is the review of *that*

Superintendant's decision which the NRAB is supposed to undertake. Of course other documents *not* "related to" the merits may also be in the "on-property" record as well. After all, there is no fixed rule or practice that limits what might go in. But the "rule" against new evidence - that is, the practice referred to by the District Court - is one that is designed only for new evidence as to the merits - the evidence that should have been submitted to the Superintendant whose decision is being reviewed. By contrast, documentation of a procedural step such as a post-hearing conference - a one last chance to settle a case after the Superintendant's decision - is not the kind of "new" evidence contemplated by such a rule.

Furthermore, contrary to the District Court's claim, it is not at all "clear" that NRAB panels always bar "new" evidence even as to the merits of the case. This Circuit has said that while "one can argue" there is such a bar to new evidence, "it is not entirely clear." See *Brotherhood of Railway Carmen v. Santa Fe Railway*, 956 F.2d 156, 158 (7th Cir. 1992). If it is not clear to this Circuit, there is no reason for the District Court to hold it should have been "clear" to the Organization. Recently, the federal courts have allowed two different NRAB panels consider new evidence on appeal relating to the *merits* of the case. *See Kinross v. Utah Railway Co.*, 179 L.R.R.M. 2671 (D.C. Utah, 2006); *Union Pacific Railroad Company v. Brotherhood of Locomotive Engineers*, U.S.D.C. Neb. 4:01-CV-250, (Jan. 16, 2003) (union allowed to produce computer print-outs not in "on-property" record where railroad not prejudiced). But these cases allow the panel to take new evidence relating to the *merits*. The essential point is that the "evidence" as to conferences is of a wholly different kind. There is no rule in the RLA, or Circular One, or the CBA that gives any reasonable notice that information as to a procedural step can be proved only in the "on-property" record and no other way.

Nor can one derive such a rule from the awards which find that conferences did not occur *in fact* and cite as a basis for the factual finding the absence of a letter or document referring to conferencing in the "on-property" record. First, in these awards, unlike here, there is apparently no dispute that the conferences failed to occur. To the extent the panels cite to the "on-property" record, it seems the citation is to support what the panel knows to be an undisputed fact. At any rate, in these cases there is no exclusion of evidence that the conferences occurred.

In no award of all the NRAB awards issued since 1934 has a case ever been dismissed with prejudice because a party failed to put in a document as to conferencing in the "on-property" record. As in *Wells*, the issue here is not only the lack of notice but the lack of prejudice to the Carrier if the panel had accepted the evidence which the Organization was given an extension of time to provide. There is a clear denial of "fundamental fairness" when the lack of prejudice to the Carrier (which did conference these cases) is weighed against the dismissal of the cases with prejudice.

Furthermore, this Circuit has often stated that the parties themselves should decide their own manner or mode or rules as to how they conference. *Ryan et al. v. Union Pacific Railroad Company*, 286 F.2d 456, 458-459 (7th Cir. 2002). It is significant that Section 3, part i of the RLA says that the parties should handle their conferences, as they "usually" do. *Ryan*, 286 F.2d at 458-459; *Pawlowski v. Northeast Illinois Regional Commuter Railroad Corporation*, 186 F.3d 997, 1000 (7^{th} Cir. 1999). In this case, significantly, the parties' own CBA has no particular rules for a post-hearing conference. There is no requirement for a written record of it, much less a rule that such a record must be included in the "on-property" record. The parties can and often do have provisions for preparation of certain documents that may be in the "on-property" record, but have no provisions here as to proof of conferencing.

Finally, the District Court unfairly implied that the lack of notice did not matter to the Organization, because in the complaint the Organization gives other reasons than lack of notice for its failure to put in evidence as to conferences in the "on-property" record transmitted to the NRAB. Yet the Organization emphatically cites lack of notice as a reason. It gives as other reasons the fact that the Carrier had never objected to lack of conferencing in the first place before the record was transmitted and the fact that conferencing is not formally required by the parties' CBA - or even the Act, in the Organization's view. However, the Organization has consistently stated that it *did* conference these cases, even if it does read the parties' CBA as not requiring such conferences. (R1, p. 4-5, ¶ 12-13) If the District Court is implying that the Organization would have acted in the same way even if the NRAB had lawfully adopted a rule as to proof of conferencing and if the Organization had had any reasonable notice of such a rule, the inference is not fair and not true. Certainly it is not proper to draw such an inference as a basis for granting a motion to dismiss. The complaint states that the existing rules of the

NRAB did not put the Organization "reasonably on notice" that conferencing could be proved only by documents made part of the "on-property" record. (R1, p. 9, ¶ 42-44) Unfair use is made of the Organization's statement that it could "easily" have complied with such a rule. The point was only to say that if there had been such a rule and if the Organization had had notice of it, the Organization would have readily complied. In any event, the Organization contended in both Counts II and III that "neither Circular No. 1 nor any other Board rule gives proper notice as to any requirement to plead and prove conferencing in any particular way." (R1, p. 10, ¶ 151) It contended that nothing in "the Act or Circular 1 or the rules... puts the Organization on notice" as to such a rule. (R1, p. 12, ¶ 61) As stated in the Organization's brief in the court below, it was not given a "fair chance to comply with it." The District Court should have accepted these allegations as true.

Based on this Circuit's decision in *Wells*, the NRAB panel here denied procedural due process when it announced and applied a new procedural rule without prior notice to the Organization.

C. The NRAB Panel Unlawfully Exceeded Its Jurisdiction or Failed to "conform, or confine itself, to matters" Within the Scope of Its Jurisdiction When it Failed to Decide These Cases on the Merits Under the CBA But Chose to Create a New Procedural Rule Not Found in the RLA, Circular One, or the CBA, so as to Narrow the Cases Which May Come Before It.

In addition to the denial of procedural due process, the Organization contended in Count II below that this panel failed to "conform or confine itself" to its proper jurisdiction under the RLA. By adopting a new "jurisdictional" requirement that conferencing could be proved only in a certain formalistic way, the panel "unlawfully limited its jurisdiction of meritorious claims." (R1, p.11, ¶ 53) This new "jurisdictional" requirement as to the mode of proving conferencing is not one authorized by the RLA or Circular One or the CBA of the parties. See paragraph 53. It is a "spurious procedural technicality" and the panel exceeded its jurisdiction in adopting new requirements to narrow the cases which may come before it.

First, the NRAB panel cannot rely on the RLA to justify this self-imposed limit as to its statutory jurisdiction. Neither in Section 2, Part Sixth or in Section 3 of the RLA is there any language that failure to prove the conferences only by evidence in the "on-property" record is "jurisdictional." 45 U.S.C. § 152 (Sixth); § 153. Nor has a single NRAB panel since the enactment of the RLA ever reached such a conclusion. Nor is there such authority in Circular One which is codified in 29 C.F.R. Part 301. Nothing in Circular One implies that proof of conferencing in the "on-property" record is "jurisdictional," or a condition of jurisdiction, or requires dismissal of cases even when it is undisputed that conferencing occurred. Nor do the RLA and Circular One allow the Board to adopt on its own "jurisdictional" rules to further limit or narrow the otherwise valid cases that arise under the parties' CBA.

What is or may be "jurisdictional" are the time limits for filing and appealing grievances under the parties' CBA. However, in these cases, the NRAB panel here is not enforcing any "jurisdictional" limit or rule in the parties' CBA. It is creating and applying its own rule. To that extent, this NRAB panel has failed to exercise its mandatory jurisdiction and render a complete "decision on the merits" based on the parties' CBA. See *Essary v. Chicago and Northwestern Transportation Company*, 618 F.2d 13 (7th Cir. 1980). In *Essary*, the employee alleged that an NRAB panel decision dismissing an award for failure to exhaust the grievance procedure in a timely manner was not an "award on the merits," as required by the RLA. This Circuit stated as follows at page 16:

> "...the NRAB's characterization of its action as a dismissal on jurisdictional grounds is arguably a mere fortuity. The Board could just as easily have described its award as a dismissal for failure to state a claim cognizable under the contract in that the requisite exhaustion was lacking. As such ... the NRAB's action would appear to be one on the merits. In substantive terms, the NRAB has rendered a complete decision on an issue involving an application of a collective bargaining agreement ... Such a decision is a decision on the merits."

By the same reasoning, however, the awards under review here would not be "complete" decisions "on the merits." Unlike the NRAB panel in *Essary*, the NRAB panel here did not apply the parties' own CBA to dismiss these claims. Indeed, there is no basis in the parties' CBA for such a failure to render a "complete" decision on the merits. This addition by the NRAB panel of a new unpublished procedural requirement frustrates the purpose of contract arbitration which is favored for its informality and lack of such requirements. Since these awards are not complete decisions on the merits and the panel has failed to conform or confine itself to its proper jurisdiction under 45 U.S.C. § 153 First(q), they may and should be set aside.

Congress imposed the broadest possible jurisdiction on the NRAB so that minor disputes under the contract would not be filed in the federal district courts or even worse, the parties would not be tempted to strike and resort to other self-help remedies because these minor disputes were not resolved. It is contrary to the literal language and purpose of the RLA to allow a panel like this free reign to adopt new and unannounced rules to limit its statutory jurisdiction to decide these cases.

After characterizing the issue here as "jurisdictional," the NRAB panel decided to dismiss the cases with prejudice. Given the backlog of cases, it must be tempting to do so. But there was no violation of a "jurisdictional" requirement under the CBA or the Act when the panel has conceded the conferences may have occurred. If it truly believed that there had been no conferences, the NRAB panel could have remanded the cases for conferencing and retained jurisdiction. Even a failure to hold a conference would not have violated a jurisdictional time limit. There is no claim here of a statutory or contractual deadline that was missed. Of course it may seem odd to remand these cases for conferencing when no one seems to dispute that the conferences had been held. Nonetheless, even if the NRAB majority did not want to consider the "new" evidence as to conferencing, it had no right or authority to dismiss these cases with prejudice when there was no basis in the RLA or Circular One or the CBA to do so.[1]

IV. The NRAB panel majority unlawfully allowed the Carrier to raise the objection as to lack of evidence as to conferencing in the on-property record when the Carrier failed to raise it in the original submission as required by Circular One.

The District Court denied plaintiff Organization's claim that the Carrier's objection was "untimely" and "belated," and held it is "clear" that an objection to "jurisdiction" can be raised "at any time." First, an objection as to the mode of proving conferencing is *not* jurisdictional, as explained above, though the NRAB panel mis-characterized it as "jurisdictional."

---

[1] The Organization did not cite NRAB decisions below since the Organization contends they have no value as precedent. However, while not submitting the following decision as "precedent," the Organization wishes to quote from one set of awards because they state so well the Organization's own argument here that a remand is to be preferred to dismissal on the merits even when (unlike here) there was no conferencing at all. In four awards issued in 1940, the well known arbitrator Frank Swacker held: "... the carrier challenges the jurisdiction of the Board on the ground that the controversies have not been conferred upon...The subject matter of these cases is in each instance one cognizable by this Board... There is, therefore no lack of jurisdiction. On the other hand it is plainly true that the cases are prematurely here.... We have had instances where, through some misadvertance (sic), there has been a technical failure to comply with the requirements of our rules which we waived where it appeared the parties had made a reasonable effort, and we have disposed of such cases... These cases will be remanded for a proper conference on the property in conformance with the intent of the law and our rules; the cases to remain in their position on the Division's docket in case it becomes necessary to bring them back." Awards 4887, 4888, 4889 and 4890. (NRAB First Division) (Swacker, May 1940).

Furthermore, the Carrier voluntarily participated in this proceeding, and such voluntary participation is often deemed to waive a threshold objection of this kind. See, e.g., *Nghiem v. NEC Electronic, Inc.* 25 F.3d 1437 (9th Cir. 1994). It is important to emphasize that when the Carrier objected, the arbitration proceedings were far along. In the NRAB, unlike private arbitration, the written submissions are made *before* and not after the hearing which is essentially oral argument. For that reason, the Circular One is clear that all relevant arguments are to be made in the *original* submission. 29 C.F.R. 301.5. "... (T)he carrier must clear and briefly set forth *all* relevant, argumentative facts....quoting the agreement and rules involved." *Id.* It may not lay back in ambush to allege rule violations which it could have raised in the original submission. Circular One prohibits such "gamesmanship." By withholding or failing to make this technical objection in its original submission, the Carrier was in violation of 29 C.F.R. 301.5 which prohibits the Carrier from making any such new "rule-related" argument thereafter. It is simply not true that the Circular One allows an objection like this "at any time."

* * *

Award No. 18679
Docket No. 33203

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

35 South La Salle Street, Chicago 3, Illinois
With Referee Le Roy A. Rader

PARTIES TO DISPUTE:

SWITCHMEN'S UNION OF NORTH AMERICA

THE NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

STATEMENT OF CLAIM: "Claim is being made for removal of discipline from the personnel record of Switchman Fred Ludwig and payment for time lost as a result of a 10-day suspension."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

In a review of this record we fail to find any evidence that conference was ever held on the property. Therefore, the findings will be that the claim was not properly progressed to this Division of the Board and we have no authority to pass on the merits of the same.

AWARD: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of FIRST
DIVISION

ATTEST: J.M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 8th day of April, 1958.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD SECOND DIVISION

Award No. 12475
Docket No. 12131-T
92-2-90-2-271

The Second Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

	(BROTHERHOOD RAILWAY
PARTIES TO	(CARMEN/DIVISION OF TCU
DISPUTE:	(
	(RICHMOND,
	(FREDERICKSBURG & POTOMAC
	(RAILROAD COMPANY

STATEMENT OF CLAIM:

1. That the RF&P Railroad (hereinafter "Carrier") violated the provisions of Rules 29 and 101 of the controlling Agreement when, on May 11, 1988 at 7:30 A.M., the Carrier's supervisor instructed Laborers, Machinists and a Pipefitter from the Richmond Shop to straighten the hand rails on Engine CSXT 1781 and CSXT Engine 1841.

2. That, accordingly, Mr. Woods (hereinafter "Claimant") is entitled to be compensated for eight (8) hours pay at the time and one half applicable Carmen's rate of pay.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

As Third Parties in Interest, the International Association of Machinists and Aerospace Workers, International Brotherhood of Firemen and Oilers and Sheet Metal Workers International Association were advised of the pendency of this dispute, but did not file a Submission with the Division.

The Claimant is employed as a Carman at the Carrier's Bryan Park Terminal Shop facility in Richmond, Virginia.

On May 30, 1988, the Organization's Local Chairman filed a Claim with the Carrier in which he set forth the following:

> "On May 11, 1988, 7:30 a.m. Hot Track Foreman A. E. Lee instructed Laborer, Machinist, & Pipefitter from Richmond Shop to straighten handrails on Eng. CSXT 1781 front handrails and CSXT Eng. 1841 front handrails.
>
> This job to take care of the locomotives in Richmond shops was bid in by Mr. Ron Woods. Mr. Woods was available to do this work, and is a violation of the current work rules.

> Requests 8 hours pay at time & half at the current rate of pay for Mr. Ron Woods Carman Richmond Shop."

The Organization relies upon Rules 29 and 101 in indicating that the work in question constitutes work traditionally and historically recognized as belonging to the Carman's Craft.

This Board finds that the specific work performed by the Claimant involved the installation of a safety chain on the handrails. The Carrier's investigation of the May 11, 1988 episode revealed that the Claimant "did participate in the work on the locomotives in question." However, the Carrier does not dispute the Organization's contention that the Claimant performed the installation of a safety chain on the handrails after they had already been straightened by persons other than Carman. Thus, the Carrier assigned work which is exclusively within the Carman's craft under Rules 29 and 101 to other crafts. Accordingly, this Board cannot conclude that there is an irreconcilable dispute with respect to the facts to warrant dismissal of the instant Claim.

However, this Board's lack of jurisdiction to resolve the Claim has been raised by the Carrier because no conference was held prior to its submission to the Board. In the Carrier's ex parte submission to the Board, the Director, Personnel and Labor Relations, in relevant part, indicated:

> "Carrier affirms that all evidence and phases of matters contained herein have been discussed with and disclosed to the employees and our position in every particular was made known to them in conference."

This paragraph is preceded by the following paragraph:

> "Finally, Carrier submits that no conference was held by the parties on the property prior to this appeal and that the Second Division should dismiss this claim for lack of jurisdiction"

Obviously, the paragraphs contradict each other. The query to be addressed is whether the reference in the Carrier's Ex Parte Submission to a "conference" is merely boilerplate language and without any factual basis. The record discloses that in a letter to the Director, Personnel & Labor Relations on January 11, 1989, the General Chairman indicated that it was his "desire to conference this matter, on the property..." He then indicated: "It would be appreciated if you might suggest a time and a date for such a meeting to discuss this and other claims."

In reply to the General Chairman's letter, the Director, Personnel & Labor Relations by letter dated January 23, 1989, requested the General Chairman to "please telephone my office at your convenience to arrange for a mutually convenient time and date."

Except for the references to scheduling a conference in this exchange of letters, there is nothing in the record to establish that a conference was held on the property. Thus, the reference to a conference in the Carrier's Ex Parte Submission to the Board is merely boilerplate language.

In light of the record, this Board concludes that the failure to have a conference constitutes a procedural flaw which is fatal to the instant Claim. In this connection Second Division Award 11416 stated:

"Suffice to say that under Section 152, Second, it is mandatory that all disputes must be considered, and, if possible, decided, with all expedition, in conference between the parties on the property. Such a conference is a prerequisite to any case being referred to this Board. The purpose of this section of the Act was to encourage settlement of disputes between the parties, rather than 'automatic' referrals of disputes to the Board.

The record of this case indicates that no conference relative to this Claim was held on the property prior to its submission to this Board. For this reason we have no alternative but to dismiss the Claim based on this procedural flaw."

AWARD

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Second
Division

Attest: /s/ Nancy J. Dever
Nancy J. Dever – Executive Secretary

Dated at Chicago, Illinois, this 4th day of November 1992.

Form 1

NATIONAL RAILROAD
ADJUSTMENT BOARD
SECOND DIVISION

Award No. 12517
Docket No. 12250
93-2-91-2-86

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE:	(INTERNATIONAL (BROTHERHOOD OF (ELECTRICAL WORKERS ((CHICAGO SOUTH SHORE AND (SOUTH BEND RAILROAD

STATEMENT OF CLAIM:

"1. That the Chicago South Shore and South Bend Railroad, violated Rule 27(a) of the controlling agreement, revised April 1, 1974, as amended, when said railroad failed to timely notify Electrician Ronald Prosser and further violated said rule when it failed to supply sufficient reasons for disallowance of his claim for four (4) hours at the overtime rate of pay on March 24, 1990.

2. Therefore, account of Carrier's violations of Rule 27(a) in accordance with Rule 27(a) of the agreement Claimant's claim should be allowed as presented.

3. In addition, the Carrier further violated the controlling agreement, in particular Rule 24, failed to allow Electrician Ronald Prosser to perform electricians' work as he claimed on March 24, 1990.

4. Therefore, the claim of Electrician Ronald Prosser should also be allowed on its merits and Claimant be paid four (4) hours at the overtime rate for Carrier's violations of the current agreement revised April 1, 1974, as amended."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Carrier, in reorganization under Chapter 11 of Federal Bankruptcy Laws, sold all of its passenger service rights to the Northern Indiana Commuter Transportation District (NICTD). It continued, however, to operate freight service over the lines acquired by NICTD. Following the change over, Carrier's locomotive maintenance work was contracted to NICTD, which employs, among others, members of the Electricians' Craft, Claimant being one. On Saturday, March 24, 1990, mechanical employees, employed by Carrier replaced a circulating pump on a locomotive. On April 17, 1990, Carrier received a

Mechanical Department Time Report - Overtime Pay indicating that Claimant was seeking four hours overtime pay, under Rule 24, for March 24, 1990, because the circulating pump was changed on Locomotive 2003. The back of the time report noted that it had been received by Carrier's Mechanical Superintendent from the IBEW Local Chairman.

On April 25, 1990, the Local Chairman was advised that the claim was denied. The basis for the denial was that Rule 43, cited in the denial, allowed the performance of incidental work at running repair work locations.

On June 19, 1990, the Organization filed exceptions to the denial. First, it maintained that Carrier offered insufficient reasons for the denial. Also, it contended that Carrier was obligated to notify the Claimant within sixty days that his Claim was denied. The Organization argued that Carrier was required to timely notify whoever filed the claim of its disallowance. When claims are filed by an individual, Carrier is not privileged to respond directly to the Local Chairman, it was suggested.

The dispute was appealed to this Board on both the time limits issue and the merits. Carrier defends before this Board on both issues and raises a third issue - Claimant is not employed by Carrier; thus this Board is without jurisdiction to consider his claim. The Organization challenges this jurisdictional issue on the grounds that it was not advanced before appeal to the Board.

While this Claim will be dismissed because the Board lacks jurisdiction to consider claims of non-employees against a Carrier concerning matters which arose at a time when the individual was not actually employed by Carrier, the Board must first comment on the parties' arguments concerning the application of the time limit Rule of the Agreement between Carrier and the Organization. The language of Rule 27(a) specifically requires Carrier to notify "whoever filed the claim or grievance" of the reasons for disallowance within sixty days of the date the claim or grievance was filed. Claims that have been filed by an individual claimant, without involvement of an Organization Representative, must be answered directly to the individual. In such circumstances an answer to the Organization Representative, bypassing the Claimant, is not sufficient under the literal application of the language of the Rule.

This record, though, clearly indicates that it was the Local Chairman who delivered the time report to Carrier's Mechanical Superintendent. This event was noted on the back of the report when it was received by the Superintendent. The act of personal delivery by the Local Chairman was, in these circumstances, the act of filing. Accordingly, Carrier properly responded to "whoever filed the claim" when it sent its denial to the Local Chairman. Moreover, if the denial was imperfect, and the Local Chairman was of the opinion that it was improperly addressed to him, he nonetheless possessed some obligation to notify the sender of his mistake within a reasonable time so that the matter could be corrected. This Board looks with disfavor upon "winning by ambush" no matter which party seeks the advantage.

With regards to the jurisdictional issue, even though the Organization argues that it comes late, this Board has uniformly held, on all Divisions, that issues of jurisdiction may be raised at any time. In this regard see Second Division Award 6003, involving the same parties before the Board here. Therein, the Board stated:

> "Once this Division is put on notice that the matter is outside its province, it must proceed on its own motion to dismiss the claim for want of jurisdiction. This is the proper course, even though the parties themselves have not raised this point on the property."

See also Third Division Awards 27575 and 20165 and the Awards cited therein.

The record is clear that Claimant was not an employee of Carrier at the time it changed out a circulating pump on Locomotive 2003. Accordingly, he is without standing to file a claim against Carrier for this work and this Board is without jurisdiction to consider any complaint he may have against this Carrier.

AWARD

Claim dismissed.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Second
Division

Attest: /s/ Nancy J. Dever
Nancy J. Dever – Executive Secretary

Dated at Chicago, Illinois, this 3rd day of March 1993.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD FOURTH DIVISION

Award No. 4931
Docket No. 4920
94-4-92-4-50

The Fourth Division consisted of the regular members and in addition Referee Robert Richter when award was rendered.

PARTIES TO DISPUTE:	(AMERICAN RAILWAY AND (AIRWAY SUPERVISORS (ASSOCIATION, DIVISION OF (TCU ((NATIONAL RAILROAD (PASSENGER CORPORATION ((AMTRAK)

STATEMENT OF CLAIM:

"1. Carrier has violated the Agreement, when on March 15, 1991, Mr. Blakey was placed on medical leave without pay in violation of the Short Term Disability Income Leave Policy.

2. Carrier be required to compensate, Mr. Blakey in accordance with the Short Term Disability Income Leave Policy, making him whole for all funds withheld."

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute involves the interpretation of Amtrak's "Short Term Disability Policy." The Carrier argues that this Board lacks jurisdiction to hear this dispute. It argues that the "Short Term Disability Policy" is not part of a Collective Bargaining Agreement between the Parties.

The Organization claims Rule 14 – Sick Leave, provides for Management's Sick Leave Plan to be applied to Supervisors covered by the Collective Bargaining Agreement. Neither Party furnished this Board with a copy of Rule 14, nor the Carrier's "Short Term Disability Plan." The Carrier did furnish page 2 of the Policy which reads:

> "Purpose
>
> The purpose of this policy is to explain the short-term disability (STD) payment schedule and the procedure for claiming benefits.
>
> Scope
>
> Benefits cover all regular, full-time employees not covered by a collective bargaining agreement based on company hire date. In addition, Mechanical Department foreman and On Board Services chiefs and supervisors covered by Rule

> Agreement with ARASA are also covered based on their ARASA seniority date.
>
> Responsibility
>
> The Assistant Vice President-Personnel is responsible for the administration, interpretation and approval of any variances to this policy."

Apparently the Organization has agreed that this Sick Leave is the management's "Short Term Disability Policy," and that they have not negotiated any Agreement with the Carrier as to the details and procedures covering their "Sick Leave."

However, before we can resolve the positions of the parties the Carrier Member at the Referee Hearing claimed this Board lacks jurisdiction to hear this case because a conference was not held between the General Chairman and the Director of Labor Relations. Many tribunals have held that jurisdictional issues can be raised at any time. See Third Division Awards 8886, 9189, 10956, 19527, 20165, and 20832.

The record is clear. A conference at the highest level was not held.

In Third Division Award14873 the Board held:

> "This Board is a creature of Statute; its powers are defined and limited by Statute. It is powerless to enlarge upon any Statutory grant. Section 2, Second of the National Railway Labor Act - in clear, concise language - calls for a conference of the parties on the property prior to submission of a claim to this Board. Section 2, Sixth, of this Act does not in any way alter the mandatory provision of Section 2,

> Second; it merely gives to either party the right of requesting a conference and imposes a time limit within which to confer after a request has been made.
>
> No matter how futile a conference may be, a conference must be held on the property prior to submission of a claim to this Board. Otherwise, this Board has no right to consider the claim in question."

The fact that conferences were held at the local level does not satisfy the requirement of the Act. In Third Division Award 12499 the Board held:

> "The purpose of the Railway Labor Act, Section 2 Second, was to encourage the confrontation of representatives of both sides as the best way to get agreement. It was intended by the Act and by Board decision that a serious effort to made to settle the claim by a conference before submission to this Board. This serious effort is not satisfied by a conference at the first level, between the Carrier representative who initiated the action which gave rise to the claim, and the local union representative. Of necessity, the serious effort must be at the top if it is to be meaningful."

Based on the fact that the Parties failed to comply with the provisions of the Railway Labor Act this Board lacks jurisdiction.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Fourth
Division

Dated at Chicago, Illinois, this 22nd day of September 1994.

Form 1

NATIONAL RAILROAD
ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30821
Docket No. SG-31458
95-3-92-3-904

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE:	(Brotherhood of Railroad Signalmen ((Delaware and Hudson Railway (Company

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Delaware and Hudson Railway Company:

1. Claim on behalf of J. L. Fargo for reinstatement with full back pay on account Carrier violated the current Signalmen's Agreement, particularly Article 12, when it dismissed the Claimant without conducting a fair and impartial investigation."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

After careful review of the record in this matter, the Board is compelled to find that we lack jurisdiction to consider the merits of the instant dispute. Nowhere does the record indicate that a conference was ever held or requested on the property. The absence of a conference requires us to find that the dispute has not been handled in accordance with the Railway Labor Act and Circular No. 1 of this Board. Accordingly, we have no choice but to dismiss this claim. See, e.g., Third Division Award 26867; Second Division Award 10421.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third
Division

Dated at Chicago, Illinois, this 27th day of April 1995.

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION

Award No. 33916
Docket No. SG-35024
00-3-98-3-786

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE:	(Brotherhood of Railroad Signalmen ((Union Pacific Railroad Company ((former Southern Pacific)

STATEMENT OF CLAIM:

> "Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad Co. (former Southern Pacific):
>
> Claim on behalf of A.S. Wessinger, J.L. Brown, and J.C. Rider for payment of 90 hours each at the straight time rate, account Carrier violated the current Signalmen's Agreement, particularly the Scope Rule, when it used non-covered employees to install switch heaters at Stratford Interlocker and West Stratford from January 29 through February 6, 1997, and deprived the Claimants of the opportunity to perform that work. Carrier's File No. 1059091. General Chairman's File No. SWGC-1464. BRS File Case No. 10780-SP."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimants were assigned to a signal gang in Liberal, Kansas, when, between January 29 and February 6, 1997, the Carrier used other employees represented by the International Brotherhood of Electrical Workers to install switch heaters at Stratford Interlocker and the west end of Stratford. On February 27, 1997 the Organization filed this claim alleging that the Carrier violated the Scope Rule of the current Agreement between the parties and on April 24, 1997 the Carrier denied the claim. The Organization appealed the matter on June 12, 1997 to which the Carrier replied on November 14, 1997, again denying the claim. From the record, it appears that the matter was not conferenced on the property as required by Section 3 First (i) of the Railway Labor Act.

Based on the Board's review of the case, we find that the claim is procedurally defective and must be dismissed. Board precedent is clear that compliance with the procedural requirements of the Railway Labor Act for consideration of claims in conference on the property is a jurisdictional prerequisite for Board consideration of a claim. See e.g., Third Division Awards 27482, 25761, 21627, and 21440.

In the instant case, since no conference was ever held on the property, the Board is without authority to take jurisdiction of the claim. Therefore, the claim must be dismissed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third
Division

Dated at Chicago, Illinois, this 24th day of January, 2000.

PETITIONER'S BRIEF

B8883

Supreme Court, U.S.
FILED

MAY 26 2009

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No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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BOTH 4MISER

QUESTIONS PRESENTED

The Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, sets forth a comprehensive framework to resolve labor disputes in the railroad industry through binding arbitration before the National Railroad Adjustment Board ("the Board"). The statute provides that the Board's judgment "shall be conclusive ... except ... for": (1) "failure ... to comply" with the Act, (2) "failure ... to conform or confine" its order "to matters within ... the [Board's] jurisdiction," and (3) "fraud or corruption" by a Board member. 45 U.S.C. §153 First (q). This case involves the Board's denial of employee grievance claims for failure to comply with its rules governing proof that the dispute had been submitted to a "conference" between the parties. 45 U.S.C. §152 Second. The Seventh Circuit held that the award must be set aside because the Board violated due process through retroactive recognition of a supposedly "new rule." The questions presented are:

1. Whether the Seventh Circuit erroneously held, in square conflict with decisions of the Third, Sixth, Tenth, and Eleventh Circuits, that the RLA includes a fourth, implied exception that authorizes courts to set aside final arbitration awards for alleged violations of due process.

2. Whether the Seventh Circuit erroneously held that the Board adopted a "new," retroactive interpretation of the standards governing its proceedings in violation of due process.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Union Pacific Railroad Company, Petitioner, was formerly known as the Southern Pacific Transportation Company. Union Pacific Corporation owns 62.6 percent of Union Pacific Railroad Company's stock and also wholly owns the Southern Pacific Rail Corporation. Union Pacific Corporation has issued publicly traded securities, and Union Pacific Railroad Company has issued publicly traded debt securities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

LIST OF PARTIES AND RULE 29.6 STATEMENT.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT.....10

ARGUMENT.....13

I. THE THREE STATUTORY GROUNDS FOR JUDICIAL REVIEW SET FORTH IN THE RAILWAY LABOR ACT ("RLA") ARE EXCLUSIVE.....13

- A. Congress Intended The Three Statutory Grounds For Judicial Review Set Forth In The RLA To Be Exclusive.....13
  - 1. The express language is clear.....14
  - 2. The statutory and legislative history confirm what the language makes clear.....17

TABLE OF CONTENTS—Continued

Page

3. A contrary interpretation would directly contravene the RLA's overriding purpose 23

B. The Possibility That A Small Number Of Constitutional Claims May Go Unreviewed Does Not Require This Court To Disregard The Plain Language Of The Statute 25

1. There is clear and convincing evidence that Congress intended to confine judicial review to the enumerated statutory criteria 25

2. The RLA's limited judicial review provision presents no serious constitutional problem 32

II. THE BOARD PANEL DID NOT VIOLATE DUE PROCESS 39

A. The Requirement That Proof Of Conferencing Be Included In The On-Property Record Was Nothing "New" 40

B. The Board Properly Applied Its Rule Of Decision To The Cases Under Review 47

CONCLUSION 54

TABLE OF AUTHORITIES

Page(s)

CASES

Allentown Mack Sales & Service, Inc. v. NLRB,
522 U.S. 359 (1998) 51

Andrews v. Louisville & Nashville Railroad Co.,
406 U.S. 320 (1972) 15, 53

Atchison, Topeka & Santa Fe Railway Co. v. Buell,
480 U.S. 557 (1987) 14, 25, 31

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 13

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 51

Bendix Autolite Corp. v. Midwesco Enterprises, Inc.,
486 U.S. 888 (1988) 51

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 25, 26

Bowen v. Michigan Academy of Family Physicians,
476 U.S. 667 (1986) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Brotherhood of Locomotive Engineers International Union v. Union Pacific Railraod Co.,
134 F.3d 1325 (8th Cir. 1998) 4

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.,
353 U.S. 30 (1957) 2

Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.,
373 U.S. 33 (1963) 19

Burlington Northern Inc. v. American Railway Supervisors Association,
527 F.2d 216 (7th Cir. 1975) 36

Califano v. Sanders,
430 U.S. 99 (1977) 25

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 50

Cole v. Erie Lackawanna Railway Co.,
541 F.2d 528 (6th Cir. 1976) 4

Commodity Futures Trading Commission v. Schor,
478 U.S. 833 (1986) 27

TABLE OF AUTHORITIES—Continued

Page(s)

Consolidated Rail Corp. v. Railway Labor Executives' Association, 491 U.S. 299 (1989) 14, 31, 43

Czerkies v. United States Department of Labor 73 F.3d 1435 (7th Cir. 1996) 24, 29, 37

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Employees Protective Association v. Norfolk & Western Railway Co., 511 F.2d 1040 (4th Cir. 1975) 4

Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S. Ct. 1396 (2008) 30, 31

Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257 (1965) 4, 23, 24, 30

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 50

Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000) 14

Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 4, 23, 31, 44

TABLE OF AUTHORITIES—Continued

Page(s)

Henry v. Delta Air Lines,
759 F.2d 870 (11th Cir. 1985) 16

Hornsby v. Dobard,
291 F.2d 483 (5th Cir. 1961) 37

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 52

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 13

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 48, 50, 51

Johnson v. Robison,
415 U.S. 361 (1974) 28

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 52

Jones v. Seaboard System Railroad,
783 F.2d 639 (6th Cir. 1986) 30

Jones v. St. Louis-San Francisco Railway Co.,
728 F.2d 257 (6th Cir. 1984) 16, 37

King Bridge Co. v. Oteo County,
120 U.S. 225 (1887) 41

Kinross v. Utah Railway Co.,
362 F.3d 658 (10th Cir. 2004) 16, 35

TABLE OF AUTHORITIES—Continued

Page(s)

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 51

Landgraf v. Usi Film Products,
511 U.S. 244 (1994) 50

Linkletter v. Walker,
381 U.S. 618 (1965) 48

Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan,
111 U.S. 379 (1884) 41

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 39

Mathews v. Eldridge,
424 U.S. 319 (1976) 32, 33

McNary v. Haitian Refugee Center,
498 U.S. 479 (1991) 28, 38

Morrissey v. Brewer,
408 U.S. 471 (1972) 32

NLRB v. Bell Aerospace Co., Division of Textron, Inc.,
416 U.S. 267 (1974) 52

TABLE OF AUTHORITIES—Continued

Page(s)

Nord v. Griffin,
86 F.2d 481 (7th Cir. 1936), *cert. denied*, 300 U.S. 673 (1937) 37

Pacific & Arctic Railway & Navigation Co. v. United Transportation Union,
952 F.2d 1144 (9th Cir. 1991) 35, 37

Pennsylvania Railroad Co. v. Day,
360 U.S. 548 (1959) 19, 44

Renne v. Geary,
501 U.S. 312 (1991) 41

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749 (1995) 50

Richardson v. United States,
468 U.S. 317 (1984) 32

Rogers v. Tennessee,
532 U.S. 451 (2001) 45

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 52

Schweiker v. McClure,
456 U.S. 188 (1982) 37, 38

Slocum v. Delaware, Lackawanna & Western Railroad Co.,
339 U.S. 239 (1950) 43, 45

TABLE OF AUTHORITIES—Continued

Page(s)

Southern Railway Co. v. Seaboard Allied Milling Corp.,
442 U.S. 444 (1979) 23

Switchmen's Union of North America v. National Mediation Board,
320 U.S. 297 (1943) 15, 16

Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks,
281 U.S. 548 (1930) 2

Thorpe v. Housing Authority of Durham,
393 U.S. 268 (1969) 52

Union Pacific Railroad Co. v. Sheehan,
439 U.S. 89 (1978) .... *passim*

Union Pacific Railroad Co. v. Price
360 U.S. 601 (1959) 18, 19, 20, 24

United Food & Commercial Workers International Union, Local No. 150-A v. NLRB,
1 F.3d 24 (D.C. Cir. 1993) 49, 50

United Paperworkers International Union v. Misco, Inc.,
484 U.S. 29 (1987) 30, 52

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Erika, Inc.
456 U.S. 201 (1982) 26, 27

United Steelworkers of America Local 1913 v. Union Railroad Co.,
648 F.2d 905 (3d Cir. 1981) 17

Walker v. Southern Railway Co.,
385 U.S. 196 (1966) 17

Webster v. Doe,
486 U.S. 592 (1988) 25, 27, 32, 38

Weinberger v. Salfi,
422 U.S. 749 (1975) 25

STATUTES AND REGULATIONS

5 U.S.C. §551(1) 30

9 U.S.C. §10 30

28 U.S.C. §1254(1) 1

28 U.S.C. §1653 42

45 U.S.C. §§151 *et seq* 1

45 U.S.C. §151a(4) 1
45 U.S.C. §151a(5) 1, 23

TABLE OF AUTHORITIES—Continued

Page(s)

45 U.S.C. §152 Second 3, 6, 34, 40, 48

45 U.S.C. §153 First (a) 30, 34
45 U.S.C. §153 First (b) 30
45 U.S.C. §153 First (c) 30
45 U.S.C. §153 First (g) 30
45 U.S.C. §153 First (h) 5
45 U.S.C. §153 First (i) .... *passim*
45 U.S.C. §153 First (j) 5, 34
45 U.S.C. §153 First (*l*) 5, 30, 34
45 U.S.C. §153 First (m) 3, 5, 14, 20, 34
45 U.S.C. §153 First (n) 30
45 U.S.C. §153 First (p) 14, 20
45 U.S.C. §153 First (q) .... *passim*

45 U.S.C. §153 Second 4

45 U.S.C. §157 21

45 U.S.C. §158 21

45 U.S.C. §159 21
45 U.S.C. §159 Third 21

50 U.S.C. §403(c) 27

29 C.F.R. §301.1(b) 3, 40

29 C.F.R. §301.2(a) 3, 4, 40
29 C.F.R. §301.2(b) 41, 48

29 C.F.R. §301.3 5

Page(s)

29 C.F.R. §301.4 5

29 C.F.R. §301.5(d) 5
29 C.F.R. §301.5(e) 5

29 C.F.R. §301.7(b) 5

Pub. L. No. 73-442, 48 Stat. 1185 (1934) 2, 17

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TABLE OF AUTHORITIES—Continued

Page(s)

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Jacob A. Seidenberg, *Grievance Adjustment in the Railroad Industry, in The Railway Labor Act at Fifty* 209 (1974) 3, 17

TABLE OF AUTHORITIES—Continued

Page(s)

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OPINION BELOW

The denial of the petition for rehearing or rehearing en banc and the concurring opinion are reported at 537 F.3d 789 (Pet.App.43a-46a). The opinion of the Seventh Circuit is reported at 522 F.3d 746 (Pet.App.1a-23a). The opinion of the United States District Court for the Northern District of Illinois is reported at 432 F. Supp. 2d 768 (Pet.App.24a-42a). Copies of the relevant Awards of the National Railroad Adjustment Board are attached at Pet.App.65a-107a.

JURISDICTION

The Seventh Circuit denied rehearing on August 11, 2008. Pet.App.43a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition Appendix (Pet.App.47a-64a) reproduces the text of the Fifth Amendment to the United States Constitution, relevant provisions from the Railway Labor Act, codified at 45 U.S.C. §§151 *et seq.*, as amended, and corresponding regulations. Other relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Statutory Background

The Railway Labor Act ("RLA" or "the Act"), codified at 45 U.S.C. §§151 *et seq.*, is a detailed statutory scheme designed to handle labor disputes arising in the railroad and airline industries. The Act's primary purpose was to provide for "the prompt and orderly settlement" of disputes in order to "'prevent strikes'" and "safeguard the vital interests of the country" in uninterrupted rail service. 45 U.S.C.

§151a(4), (5); *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (citation omitted); *see also Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 94 (1978) ("Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements.").

When first enacted in 1926, the RLA directed unresolved grievances to private adjustment boards established by the parties and composed of equal numbers of management and employee representatives. *The Railway Labor Act* 62 (Michael E. Abram et al. eds., 2d ed. 2005) (1995). This did not work. Parties failed to establish boards, deadlocks were common, and grievances remained unresolved. *Id.* at 64-65; William H. Spencer, *The National Railroad Adjustment Board* 11-12 (1938).

To remedy these issues, Congress amended the Act in 1934 to create the National Railroad Adjustment Board ("NRAB" or "the Board") and to declare arbitration mandatory and binding. Pub. L. No. 73-442, 48 Stat. 1185 (1934); Abram, *supra*, at 66-67; *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 34-39 (1957). Under the 1934 Act, NRAB awards were "'final and binding upon both parties to the dispute, except insofar as they contain a monetary award.'" Abram, *supra*, at 73 (citation omitted). In the event a carrier failed to comply with a monetary award, the employee was permitted to bring an enforcement action, where the findings of the Board were to be "prima facie evidence of the facts stated therein." *Id.* Thus, employees who did not prevail before the Board were afforded no review, while an aggrieved carrier received a trial *de novo*. *Id.*; *see also* Jacob A. Seidenberg, *Grievance Adjustment in the Railroad Industry, in The Railway Labor Act at Fifty* 209, 233-34 (1974).

In 1966, Congress amended the RLA again--this time to ensure finality of Board awards and to cure the perceived inequity between the review afforded to employees and that afforded to carriers. Pub. L. No. 89-456, 80 Stat. 208 (1966). Congress declared that Board awards would be "final," "binding," and "conclusive on the parties." 45 U.S.C. §153 First (m), (q). And it granted both carriers and employees equal but limited judicial review. *Id.* §153 First (p), (q).

The Grievance Process

The grievance procedure arising out of disciplinary charges begins with a series of investigations, hearings, and appeals that take place on the railroad property as set forth in the parties' collective bargaining agreement ("CBA"). *See* 45 U.S.C. §153 First (i) (providing for disputes to be handled "in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes"); *see also* 29 C.F.R. §301.2(a).

If one of the parties is dissatisfied with the outcome, the dispute must be submitted to a "conference." *See* 45 U.S.C. §152 Second ("All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."); *see also* 29 C.F.R. §301.1(b). The investigations, hearings, and conferences are collectively referred to as "on-property" proceedings.

If the dispute cannot be resolved in conference, the parties may initiate arbitration proceedings before the appropriate division of the NRAB.[1] 45 U.S.C. §153 First (i); 29 C.F.R. §301.2(a). The Board handles so-called "minor" disputes—those that "'grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions'" and "involve 'controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.'" *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994) (citation omitted). In contrast, "major" disputes "relate to 'the formation of collective [bargaining] agreements or efforts to secure them.'" *Id.* at 252 (citation omitted) (alteration in original). The NRAB serves as an "expert body" "peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world." *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965). The Board is split among four divisions, with each having jurisdiction over different classes of employees. 45 U.S.C. §153 First (h); 29 C.F.R. §§301.3-.4.

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[1] The RLA also permits parties to refer disputes to one of two other types of arbitral bodies as an alternative to the NRAB: "public law boards" and "special boards of adjustment." 45 U.S.C. §153 Second; *Bhd. of Locomotive Eng'rs Int'l Union v. Union Pac. R.R. Co.*, 134 F.3d 1325, 1332 n.4 (8th Cir. 1998). The rules governing "private" board proceedings are creatures of contract among the parties, but the scope of judicial review is the same as that for the NRAB under 45 U.S.C. §153 First (q). *See, e.g., Cole v. Erie Lackawanna Ry. Co.*, 541 F.2d 528, 531-32 (6th Cir. 1976); *Employees Protective Ass'n v. Norfolk & W. Ry. Co.*, 511 F.2d 1040, 1045 (4th Cir. 1975).

Although the NRAB is an arbitral body, Congress set forth detailed procedural requirements to ensure fairness to all parties. The RLA requires the Board to provide "due notice of all hearings," an opportunity for the parties to "be heard ... in person," and the option to be represented "by counsel, or by other representatives, as they may respectively elect." 45 U.S.C. §153 First (j). Participants are required to set forth, in written form, "all relevant argumentative facts, including all documentary evidence submitted in exhibit form" and to submit "a full statement of all facts and the supporting data bearing upon the disputes." 29 C.F.R. §301.5(d)-(e); 45 U.S.C. §153 First (i); *see also* 29 C.F.R. §301.7(b). This evidence is commonly referred to as the "on-property record." After reviewing the record before it and hearing argument, the Board makes an award "in writing" and "furnishe[s it] to the respective parties to the controversy." 45 U.S.C. §153 First (m). In the event the Board is deadlocked, a neutral "referee" is appointed to break the tie. *Id.* §153 First (*l*). The Board's award "shall be final and binding upon both parties to the dispute." *Id.* §153 First (m).

If either party is dissatisfied with the award judicial review is available, but only under limited circumstances. The Act unequivocally states that "the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division" for only three specific reasons: (1) "failure of the division to comply with the requirements of this Act," (2) "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction," or (3) "fraud or corruption by a member of the division making the order." *Id.* §153 First (q).

Proceedings Below

1. Union Pacific Railroad Company ("Union Pacific" or "the Carrier") and the Brotherhood of Locomotive Engineers and Trainmen ("BLET" or "the Organization") are parties to several agreements covering Union Pacific employees. Pet.App.28a. Union Pacific charged five employees with disciplinary violations after a formal investigation, and a formal hearing that was recorded and transcribed with attached exhibits. Pet.App.3a, 28a-29a. BLET filed claims with Union Pacific challenging each decision as violating one of the CBAs. Pet.App.3a, 28a-29a.

Dissatisfied with the result, BLET filed a Notice of Intent to arbitrate before the Board. Pet.App.29a. In compiling the on-property record, the Organization failed to include evidence that any of the cases had been conferenced as required by the Act, 45 U.S.C. §152 Second. Pet.App.68a-69a, 76a-77a, 84a-85a, 92a-93a, 100a-101a. After the record was closed, Union Pacific raised this omission as an issue precluding the Board's exercise of jurisdiction over the cases. Pet.App.66a, 74a, 82a, 90a, 98a. BLET offered to submit new evidence to demonstrate that the conferencing requirement had been satisfied, but the Board refused to consider this evidence because it was untimely. Pet.App.69a, 77a, 85a, 93a, 101a. Citing extensive Board precedent, the panel held that BLET's failure to include evidence of conferencing in the on-property record required dismissal and, on March 15, 2005, the Division issued five arbitration awards denying the claims for lack of jurisdiction: Award Nos.

26089, 26090, 26092, 26093, and 26094 (hereinafter "Awards"). Pet.App.65a-107a.

In all relevant parts, the awards are identical and conclude that based on "the weight of Board precedent upholding the Carrier's position," "the record developed on the property does not substantiate that the on-property conference prerequisite was, in fact, satisfied" and, accordingly, "[t]he Board is ... without jurisdiction to consider this dispute." Pet.App.68a, 76a, 84a, 92a, 100a. The Board panel went on to explain that it could not consider the Organization's belated submissions because "all evidence of the statutorily required conference is entirely absent from the on-property record, where, in order to be considered by the Board, it must reside." Pet.App.69a, 77a, 85a, 93a, 101a. The panel thus "stress[ed]" that "the Organization's belated production of supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal." *Id.*

2. BLET filed a Petition for Review to the United States District Court for the Northern District of Illinois, arguing that: (1) conferencing is not required by the RLA; (2) the Board had improperly limited its jurisdiction by refusing to consider the merits of its claims; and (3) the Board's decision not to consider BLET's untimely evidence of conferencing amounted to a violation of due process. Pet.App.25a.

The district court dismissed under Rule 12(b)(6). Pet.App.42a. The court held that Board precedent "made clear that it considered conferencing a jurisdictional requirement and ... that the record should contain evidence of such conferencing." Pet.App.40a-41a. "Under its limited scope of review," therefore, it could not "find that the NRAB proceedings were fundamentally unfair when the Organization had the ability to submit evidence of conferencing." Pet.App.40a. The district court also rejected BLET's suggestion that Union Pacific's jurisdictional objection was untimely, pointing out that the Board had "considered" "late challenges to their jurisdiction in the past." Pet.App.41a.

3. On appeal, BLET abandoned its claim that conferencing was not required by the Act and argued only that the Board denied it due process and failed to act within the scope of its jurisdiction by requiring proof of conferencing in the on-property record. Pet.App.6a-7a. At the outset, the Seventh Circuit rejected Union Pacific's attempt "to cast doubt on the law of this circuit that allows judicial review of Board orders where a party asserts a due process violation." Pet.App.8a. Finding that judicial review of constitutional questions cannot be foreclosed without "clear and convincing evidence" from Congress, and deeming the RLA to fall short of that standard, the Seventh Circuit "decline[d] to depart from [its] prior holdings on this issue." Pet.App.8a-9a.

The Seventh Circuit reasoned that "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. It then reviewed the arbitral decisions of the Board, the RLA, and the regulations (known as "Circular One"), and found nothing clearly requiring evidence of conferencing to be included in the record. Pet.App.13a-22a. Finally, the Seventh Circuit held that the Board denied BLET due process by considering the Carrier's late jurisdictional objection but refusing to review the Organization's untimely submission and reversed the district court.[2] Pet.App.21a-23a.

4. The Seventh Circuit denied Union Pacific's petition for rehearing and rehearing en banc on August 11, 2008. Pet.App.43a. Chief Judge Easterbrook and Judge Posner joined in the denial, but wrote a separate concurrence. Recognizing the 4-5 split among the Circuits on the question of whether there is a separate, extra-statutory exception permitting due process review, they ultimately found "little to be gained from making the conflict 5-4 one way rather than 5-4 the other way," because "[o]nly Congress or the Supreme Court can bring harmony." Pet.App.44a.

The concurrence also questioned the assumption underlying the panel's due process holding: "that, if the Board adopted this requirement in the course of decision—that is, by adjudication rather than prospective rulemaking—then it violated the Constitution." Pet.App.45a. To the contrary, "[l]awmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the parties but also to all similar cases." *Id.* This is true of administrative agencies as well, and applies regardless of whether the

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[2] The Seventh Circuit also erroneously suggested that there was "no question that the parties had met in conference and therefore the presentation of new evidence in no way prejudiced the Carrier." Pet.App.21a. In fact, the case was before the district court on a Rule 12(b)(6) motion to dismiss and whether or not there had been a conference is very much in dispute. Rehearing Pet. at 6-7 (7th Cir. Apr. 23, 2008).

"new" rule is substantive or procedural in nature. Pet.App.45a-46a.[3]

SUMMARY OF ARGUMENT

1. The RLA's provision governing judicial review of NRAB decisions could not be more clear. "[T]he findings and order of the division shall be conclusive on the parties, *except* that the order of the division may be set aside, in whole or in part, or remanded to the division" for any of three specified reasons. 45 U.S.C. §153 First (q) (emphasis added). There is no basis for review of "due process" or any other issues *not* encompassed within the three statutory grounds for judicial review. This Court has already construed the statutory language, in a case where the plaintiff was attempting to raise extra-statutory "due process" objections, and squarely held that NRAB decisions "may be set aside *only for the three reasons specified therein.* We have time and again emphasized that this statutory language means *just what it says.*" *Sheehan,* 439 U.S. at 93 (emphasis added).

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[3] As discussed in the Petition for Certiorari, Chief Judge Easterbrook mistakenly believed that "all parties to this case assumed that a change of law during the course of administrative adjudication offends the Constitution." Pet.App.46a. Union Pacific in fact argued in its brief below that: "BLET is unable to point to a single case holding that an arbitrator violates due process if he or she applies a new or previously obscure evidentiary rule, so long as both sides are in fact allowed to make their case on the disputed evidentiary point." Def.Appellee Br. at 26 (7th Cir. Oct. 30, 2006). Regardless, the Seventh Circuit actually ruled on the issue: "When a Board creates a new requirement on its own, it is not interpreting a CBA or following the dictates of the RLA or its regulations.... [S]uch changes in the rules violate the due process rights of the parties." Pet.App.22a.

The statutory and legislative history confirm that conclusion. Prior to 1966 an employee disappointed by a Board decision received no judicial review whatsoever. But carriers could obtain a trial *de novo* in court simply by refusing to comply with a resulting award. Congress responded to the perceived inequity by providing that Board decisions would be "final and binding" on both sides, subject to a limited (but even-handed) judicial review provision. Congress's manifest desire was for a swift, efficient, and *final* determination of minor disputes by the Board—not endless litigation in court.

The evidence that the RLA "means just what it says," *Sheehan*, 439 U.S. at 93, is clear enough to overcome any clear statement rule or presumption favoring judicial review that this Court chooses to apply. And respecting Congress's obvious wishes here does not raise any serious constitutional issues. The requirements of due process are flexible and context-specific, and Congress's judgment that the RLA provides sufficient process on its own terms is reasonable and entitled to respect. The RLA guarantees parties the fundamental requirements of due process—including notice and an opportunity to be heard before a neutral decisionmaker—and judicial review of whether those requirements have been satisfied. If parties are unable to pursue novel theories of due process beyond what the RLA provides (such as Respondent's unprecedented due process theory in this case), that is appropriate in these limited and unusual circumstances. Congress reasonably patterned the grounds for review of Board awards after the RLA's judicial review provision for voluntary arbitration—where, of course, there is no state action and even the most creative parties cannot dress up their procedural complaints in constitutional garb. It does not violate due process for parties to NRAB proceedings to receive basically the same procedural protections, and the same grounds for judicial review, that are enjoyed by parties to employment arbitration in most other settings.

2. If this Court reaches the merits of Respondent's "due process" objections it should reverse the Seventh Circuit. The NRAB simply, and reasonably, interpreted the statute and its own rules to require that the petitioner's initial submission establish a fact (on-property conferencing) that is essential to the Board's jurisdiction. Respondent claims to have been surprised by that ruling, and that its surprise means that due process was violated. That contention is wrong on the facts and the law.

On the facts, there was nothing unprecedented or unpredictable about the Board's holding. The statute requires parties to supply the Board "with a full statement of the facts and all supporting data bearing upon the disputes." 45 U.S.C. §153 First (i). And several prior decisions of the Board had interpreted the rules this way. The Seventh Circuit noted that those decisions were not precedential—but that reasoning would mean that the Board engages in unfair surprise whenever it applies a general rule in a manner that is ambiguous or debatable by lawyers, even for the hundredth time.

On the law, even if this *were* the first time the Board had addressed the issue, it simply does not implicate due process for the Board to resolve a debatable issue and apply its resolution to the parties at hand. What Respondent is complaining about is just the ordinary retroactivity inherent in all adjudication. The law has been built, for centuries, around the premise (a fiction, perhaps, but a necessary one) that courts simply declare what the rules always were—and as a result litigants cannot claim unfair surprise when a legal dispute is resolved against them. The same is true in agency adjudication and in arbitration. Respondent's (and the Seventh Circuit's) due process theory in this case would transform all debatable questions into fodder for constitutional litigation, rendering the legal system utterly paralyzed and unable to function.

The decision of the Seventh Circuit must be reversed.

ARGUMENT

I. THE THREE STATUTORY GROUNDS FOR JUDICIAL REVIEW SET FORTH IN THE RAILWAY LABOR ACT ("RLA") ARE EXCLUSIVE

A. Congress Intended The Three Statutory Grounds For Judicial Review Set Forth In The RLA To Be Exclusive

As in any case of statutory construction, this Court's analysis "begins with 'the language of the statute.'" *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). And "where the statutory language provides a clear answer, it ends there as well." *Id.*; *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citation omitted). This Court "'presume[s] that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Barnhart*, 534 U.S. at 461-62 (citation omitted). "When the statute's language is plain, the sole function of the courts ... is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks and citations omitted).

1. The express language is clear

The express language of the RLA is clear and unequivocal. Board awards shall be "final and binding upon both parties." 45 U.S.C. §153 First (m). "[T]he findings and order of the division shall be conclusive on the parties, *except* that the order of the division may be set aside, in whole or in part, or remanded to the division" for only three specific reasons: (1) "failure of the division to comply with the requirements of this chapter," (2) "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction," or (3) "fraud or corruption by a member of the division making the order." 45 U.S.C. §153 First (q) (emphasis added); *see also id.* §153 First (p) (limiting reasons for refusing enforcement of a Board award to the same three grounds).

In the words of this Court, judicial review afforded under the RLA is "'among the narrowest known to the law.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 563 (1987) (citation omitted); *see also Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 304 (1989) ("Judicial review of the arbitral decision is limited.") (citing 45 U.S.C. §153 First (q)). And, as this Court has repeatedly recognized, the statutory language means exactly what it says.

In *Union Pacific Railroad Co. v. Sheehan*, this Court held that "[j]udicial review of [NRAB] orders is *limited to three specific grounds .... Only* upon one or more of these bases may a court set aside an order of the [NRAB]." 439 U.S. at 93 (emphasis added). In *Sheehan*, the NRAB dismissed a wrongful discharge claim because the employee had failed to file his appeal within the time limits provided for in the collective bargaining agreement. *Id.* at 89. The employee argued that the NRAB should have tolled the filing period during the pendency of a state court lawsuit he filed, and the Tenth Circuit agreed that the NRAB's "'failure to address the merits of [the employee's] claim denied him due process.'" *Id.* at 91 (citation omitted).

This Court squarely rejected the Tenth Circuit's "due process" rationale and reversed, reasoning that the employee "simply failed to demonstrate the existence of any of the grounds for review set forth in §153 First (q)." *Id.* at 93. It explained that "[t]he *dispositive* question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the [RLA]." *Id.* (emphasis added). The *Sheehan* Court found the Act's plain language "unequivocal[]" on this point: NRAB decisions "may be set aside *only for the three reasons specified therein.* We have time and again emphasized that this statutory language means *just what it says.*" *Id.* (emphasis added); *see also Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972) ("[A party] is limited to the judicial review of the Board's proceedings that the Act itself provides."); *cf. Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 302 (1943) ("Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.").[4]

Following *Sheehan*, several courts of appeals have focused on the plain language, asked this "dispositive question," and held that where "due process" challenges to particular NRAB determinations do not "fall within any of the three limited categories of review," they cannot serve as a basis to set aside a Board award. Most recently, in *Kinross v. Utah Railway Co.*, the Tenth Circuit held that *Sheehan* "preclude[s] judicial review of due process claims beyond those specifically articulated in the Railway Labor Act." 362 F.3d 658, 662 (10th Cir. 2004). The Sixth Circuit likewise held that under *Sheehan* and the plain language of the RLA review "is limited to only those grounds specified" and thus an extra-statutory due process claim "cannot serve as a basis for judicial review." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 261 & n.3 (6th Cir. 1984); *see also Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985) (holding that, per *Sheehan*, "'judicially created due process challenges to System Board awards'" "'must fail'") (quoting district court); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 914 (3d Cir. 1981) (rejecting argument that court can review alleged due process violations that do not otherwise fit into three statutory grounds based on *Sheehan* and "statutory command").

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[4] Although *Switchmen's Union* predates the current judicial review provision and did not involve a constitutional claim, its approach to statutory interpretation of the RLA is informative. This Court held that Congress foreclosed all judicial review of National Mediation Board decisions certifying a union as the employees' representative. 320 U.S. at 300. Where "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created" and "selected the precise machinery and fashioned the tool which it deemed suited to that end," there was no reason to believe that "judicial review on top of the Mediation Board's administrative determination would strengthen that protection." *Id.* at 301.

Where, as here, the text is unambiguous, the statutory analysis is at an end.

2. The statutory and legislative history confirm what the language makes clear

The overall statutory scheme and the history of the RLA confirm that conclusion.

The specific judicial review provision at issue here was enacted as part of the 1966 Amendments to the RLA. Prior to 1966, employees who did not prevail before the Board were afforded *no review* whatsoever. *See* Pub. L. No. 73-442, 48 Stat. 1185, 1191 (1934) ("[A]wards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."). Carriers, on the other hand, could procure judicial review (usually in the form of a trial *de novo*) if they refused to pay a monetary award and the prevailing employee brought an enforcement action. *See id.* at 1192 (providing for an enforcement action in the event the carrier fails to comply with a Board award wherein "findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated"); Seidenberg, *supra*, at 233-34. Thus, whereas a "'railroad affected [could] obtain judicial review of [an] award by declining to comply with it,'" an aggrieved employee had "'no means by which judicial review [could] be obtained.'" *Walker v. S. Ry. Co.*, 385 U.S. 196, 198 (1966) (citation omitted).

As this Court explained in *Union Pacific Railroad Co. v. Price*, that "disparity in judicial review of Adjustment Board orders ... was explicitly created by Congress." 360 U.S. 601, 615-16 (1959). Under the pre-1966 statutory scheme, if an "employee loses his case before the National Railroad Adjustment Board, he has *no judicial remedy at all*—he cannot sue the railroad on his claim, and he cannot obtain judicial review of the decision of the Board." Debate in the House of Representatives, 89th Cong., 2d Sess. (Feb. 9, 1966) ("House Debate"), *reprinted in* 1 *The Railway Labor Act of 1926: A Legislative History* ("*Legis. Hist.*") 1354 (Michael H. Campbell & Edward C. Brower III eds. 1988) (Rep. Staggers) (emphasis added); *see also* H.R. Rep. No. 89-1114 (1965) ("House Report"), *reprinted in* 1 *Legis. Hist.* 1307, 1321 (Before "[i]f ... an employee fail[ed] to receive an award in his favor, there [was] no means by which judicial review may be obtained."); S. Rep. No. 89-1201 (1966) ("Senate Report"), *reprinted in* 1 *Legis. Hist.* 1337, 1339 (same); House Debate, 1 *Legis. Hist.* at 1373 ("[A]ll awards which deny a worker's claim for settlement of a grievance are final and binding, while those awards which sustain his claim when money is involved are not final and binding on the employer.") (Rep. O'Konski); *id.* at 1356 ("As the law now stands, the right to a court review ... is an entirely one-sided affair.... There is *no way that [an employee] can obtain a review* of that decision." (emphasis added)) (Rep. Younger).

Congress understood this Court's case law to hold that the absence of *any* review under the 1934 Act was constitutionally permissible, and that understanding suffused the debate on the 1966 Amendments. *See* House Report, 1 *Legis. Hist.* at 1321 (explaining that the "constitutionality of permitting judicial review to be obtained by carriers while such review is prohibited to employees was upheld" by this Court); House Debate, 1 *Legis. Hist.* at 1357 ("[T]he Supreme Court has upheld the principle of not permitting employees any review of denied claims, over dissents pointing out how unfair this is.") (Rep. Williams). Citing *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963), *Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959), and *Price*, 360 U.S. 601, "[t]he committee point[ed] out" that because "the constitutionality of permitting no review of decisions of the Board has been upheld," "[i]t would therefore follow that the constitutionality of permitting only limited review should be upheld" as well. House Report, 1 *Legis. Hist.* at 1323. In all three of those cases, this Court held that employees were precluded from seeking redress outside of the statutorily prescribed procedures. *See Bhd. of Locomotive Eng'rs*, 373 U.S. at 38 (union cannot legally strike to enforce Board award but rather must utilize statutory enforcement procedure); *Price*, 360 U.S. at 608-09 (discharged employee aggrieved by Board decision could not pursue common law action); *Day*, 360 U.S. at 552 (resigned employee could not file common law action in first instance but rather must seek redress before the NRAB). While none of the cases directly addressed constitutional claims, Congress read them as holding that judicial review could be entirely precluded.

Several *lower* courts dissatisfied with the perceived unfairness of the review scheme under the 1934 Act had taken it upon themselves to permit (with little discussion) non-statutory "due process" challenges by employees. *See Price*, 360 U.S. at 616. But Congress chose to address that perceived unfairness in another way. In 1966, the Act was amended to provide that "awards shall be final and binding upon both parties to the dispute" *period*, with no exception for money awards; that the Board findings and order "shall be conclusive on the parties"; and that judicial review for non-prevailing parties (employees or carriers) would be available for three specified reasons. 45 U.S.C. §153 First (m), (p), (q). Congress's preferred resolution was to *strengthen* the finality of Board awards by equalizing the playing field. Senate Report, 1 *Legis. Hist.* at 1337 (purpose is to make NRAB awards final and "to provide equal opportunity for limited judicial review ... to employees and employers"); House Report, 1 *Legis. Hist.* at 1309 (similar); House Debate, 1 *Legis. Hist.* at 1357 ("the bill provides for finality of decisions" and "for [e]quality of treatment of both parties" by eliminating the "one-sided right of railroads to take money awards cases to court for de novo review") (Rep. Williams).

Congress patterned the 1966 review provisions after the limited grounds for judicial review traditionally available to parties aggrieved by the decisions of private arbitrators. House Debate, 1 *Legis. Hist.* at 1354 ("[T]he feeling of our committee [was] that the review prescribed for awards should be that generally prescribed for arbitration tribunals ....") (Rep. Staggers); *id.* at 1370 ("Judicial review would thus be available to employers and employees alike, but on the limited basis traditionally applicable to awards of arbitration tribunals ....") (Rep. Harsha). This new regime limited judicial review for both carriers and employees "to the determination of questions traditionally involved in arbitration legislation." House Report, 1 *Legis. Hist.* at 1309.

More specifically, "[t]he limited grounds for judicial review" Congress chose "are the same grounds that are provided in section 9 of the Railway Labor Act." *See* Senate Report, 1 *Legis. Hist.* at 1339; *see also* House Report, 1 *Legis. Hist.* at 1322 ("The foregoing three tests are the tests traditionally applicable to awards of arbitration tribunals, as set out in section 9 of the Railway Labor Act.").[5] Section 9 was enacted in 1926 to govern review of *voluntary* arbitration proceedings. *See* 45 U.S.C. §§157-59.[6]

During the congressional hearings, the railroads argued that compulsory arbitration required more protection than that afforded to "awards of boards of arbitration created by agreement of the parties" and subject to Section 9 of the Act. *See, e.g., Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Public Welfare,* 89th Cong. (1966), *reprinted in* 4 *Legis. Hist.* 124. They also insisted that "awards [should] be subject to different, more demanding standards of judicial review than those of arbitrating bodies that act under private agreements." *Id.* at 125. Congress disagreed. Congress specifically rejected a railroad proposal that would have expanded judicial review beyond the grounds traditionally provided for arbitration awards to permit a court to set aside Board awards that were "contrary to constitutional right, power, privilege, or immunity." *Id.* at 123-32.

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[5] Section 9 provides for judicial review where: (a) "the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act"; (b) "the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate"; or (c) "a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption." 45 U.S.C. §159 Third.

[6] In practice, Sections 9 governs the arbitration of "major" disputes and other interest disputes. *See* Benjamin Aaron, *Voluntary Arbitration of Railroad and Airline Interest Disputes, in The Railway Labor Act at Fifty* 129, 130-31 (1974).

Not a single member of Congress suggested an intent to preserve the amorphous "due process" review previously recognized by some lower courts. While Congress shared the fairness concerns that had prompted some judges to create an avenue for aggrieved employees to seek redress, it adopted a quite different and very specific solution to that problem. In purpose and effect, the three well-recognized bases for review of arbitration awards essentially subsumed the "due process" challenges read into the statute by the lower courts. As even Respondent concedes, "[t]he grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself." Br. in Opp. at 1; *see also infra* at 36 & n.9.

That Congress intended the statutory grounds to be exclusive is as plain from the legislative history as it is from the text itself. The committee reports explain that "[t]he only matters which may be considered by the court are" the three grounds now-specified in the Act. House Report, 1 *Legis. Hist.* at 1322; Senate Report, 1 *Legis. Hist.* at 1342 ("[J]udicial review ... would be available to either party but limited to" the three statutory grounds). The floor debate repeatedly and uniformly confirmed this sentiment. As one representative explained, the 1966 Amendment "limits the judicial review currently available to carriers, and expands the review available to employees, so that each side is entitled to obtain review of Board decisions *on these grounds and these three grounds only.*" House Debate, 1 *Legis. Hist.* at 1354 (Rep. Staggers) (emphasis added); *see also e.g., id.* ("Under the bill as reported, all decisions of the [NRAB] are final and may not be reviewed by the court *except on the grounds specified in the law* ...." (emphasis added)); *id.* at 1364-65 (judicial review "limited" to the three categories) (Rep. Pickle).

3. A contrary interpretation would directly contravene the RLA's overriding purpose

The recognition of an additional, extra-statutory ground for review of "due process" claims would fundamentally undermine the policies underlying the RLA. *See* 45 U.S.C. §151a(5) (overarching purposes include "provid[ing] for the prompt and orderly settlement of all disputes growing out of grievances"). "The disruptive practical consequences of such a determination" should "confirm [the] view that Congress intended no such result." *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979) (presumption of judicial review overcome when applied to Interstate Commerce Commission's refusal to investigate lawfulness of proposed rate increase).

"Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes." *Hawaiian Airlines, Inc*, 512 U.S. at 252; *Gunther*, 382 U.S. at 263-64 (RLA provides for a "'mandatory, exclusive, and comprehensive system for

McClure, 456 U.S. 188 (1982), for example, this Court held that an administrative scheme for Medicare Part B benefits satisfied due process, notwithstanding that private carriers made the final award determination without any administrative or judicial review, because the hearing officers have a "'thorough knowledge of the Medicare program'" and "additional procedures" would not "reduce the risk of erroneous deprivation of Part B benefits." *Id.* at 199-200 (citation omitted). The RLA review provisions likewise reflect Congress's (and the industry's) judgment that railroad arbitration disputes should not be a battleground for novel and creative constitutional adjudication—and that in this narrow and unique context swift, workable, and final resolution of disputes is more important than judicial review of every possible theory that a smart lawyer can dress up in constitutional garb. Due process does not require a different balance.

This Court has "never held ... that Congress may not, by explicit language, preclude judicial review of constitutional claims," *McNary*, 498 U.S. at 504 (Rehnquist, C.J., dissenting), and several Justices have concluded that, in various circumstances, Congress did just that.[11] Congress's intent in the RLA is crystal clear, and enforcing the plain statutory text will not deprive anyone of serious constitutional rights, or aggrandize the political branches at the expense of the judiciary's prerogative to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Respondent is essentially complaining that it was surprised by a routine holding that it failed to carry an evidentiary burden in an employment arbitration proceeding. If its attempt to repackage that grievance as a due process case is frustrated by the RLA's limited review provisions, the constitutional order will not be seriously threatened.

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[11] *See Webster*, 486 U.S. at 612-13 (Scalia, J., dissenting) (rejecting the view that "judicial review of all 'colorable constitutional claims'" is "constitutionally required"); *id.* at 605 (O'Connor, J., concurring in part and dissenting in part) (concluding that Congress had authority "to close the lower federal courts to constitutional claims" on facts of case); *McNary*, 498 U.S. at 504 (Rehnquist, C.J., dissenting) (concluding that Congress had authority to "preclude review of constitutional claims" on facts of case).

II. THE BOARD PANEL DID NOT VIOLATE DUE PROCESS

Even if an amorphous, extra-statutory due process exception could be read into the RLA, the Seventh Circuit was wrong to set aside the Board award on due process grounds here.

The Seventh Circuit held that the NRAB panel's dismissal amounted to a due process violation because the requirement that evidence of conferencing be included in the on-property record was a "new rule, unknown to the Organization." Pet.App.10a. The court held that "if the Board created a new rule previously unknown and unapplied, this would constitute a violation of due process." Pet.App.11a. And it also concluded that "fundamental fairness" required the Board to either consider Respondent's new outside-the-record submissions or reject Petitioner's jurisdictional argument raised after the record closed.

The Seventh Circuit's analysis fails on the facts and on the law. On the facts, the Board's requirement that evidence of conferencing must be contained in the record was not actually "new." On the law, a tribunal does not announce a "new rule" requiring prior notice to the parties whenever it interprets an ambiguous provision or applies existing rules to novel factual circumstances. What the Seventh Circuit described as the Board's unconstitutional "creat[ion of] a new requirement" (Pet.App.22a) was, at most, the ordinary retroactivity inherent in all adjudication. That raises no difficulties of constitutional stature.

A. The Requirement That Proof Of Conferencing Be Included In The On-Property Record Was Nothing "New"

The central premise for the Seventh Circuit's due process holding was its belief that the rule applied by the Board panel was "new." That premise was factually incorrect.

The panel's award fully comports with the text of the RLA and corresponding regulations (known as "Circular One") which make clear that:

- "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. §152 Second; *see also* 29 C.F.R. §301.1(b);

- "[T]he disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board *with a full statement of the facts and all supporting data* bearing upon the disputes." 45 U.S.C. §153 First (i) (emphasis added); *see also* 29 C.F.R. §301.2(a); and

- "*No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.*" 29 C.F.R. §301.2(b) (emphasis added).

The NRAB operates as an appellate body and not as a court of first review. Proceedings before the Board are "on the basis of the record and closely resemble an appellate proceeding based on the record established during the on-property stage." Abram, *supra*, at 407-08; *id.* at 407 ("The Board does not conduct an evidentiary hearing but reviews an administrative record that is created during the grievance handling procedure ....").[12] That the Board would read these rules together to require that the basis for its jurisdiction, *i.e.*, conferencing, be evident from the on-property record is entirely consistent with the plain language of the RLA and Circular One and certainly does not upset any settled expectations. To the contrary, appellate tribunals have long required that the basis of their jurisdiction be apparent from the record. *See, e.g.*, *King Bridge Co. v. Oteo County*, 120 U.S. 225, 226 (1887) (cited in *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884) (This Court is required to "deny its own jurisdiction ... in the exercise of its appellate power ... in all cases where such jurisdiction does not affirmatively appear in the record").[13]

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[12] *See also* BLET's Opp. to Mot. to Dismiss at 5, 12 (N.D. Ill. Aug. 23, 2005) (referring to the NRAB as an "appellate body" where the "notice of intent is like a notice of appeal"); Appellant Br. at 9 (7th Cir. Sept. 20, 2006) (referring to the proceeding before the NRAB as comparable to "an appellate proceeding"); Br. in Opp. at 1-2 ("Congress established the [NRAB] as an 'appellate body'" constituted to perform an "appellate function.").

Indeed, as the district court found (Pet.App.40a-41a), a number of Board awards prior to the ones at issue here dismissed claims where there was no evidence of conferencing in the existing record. *See, e.g.*, First Division Award, No. 18679 (Apr. 8, 1958) (dismissing case without reviewing merits where "a review of th[e] ... record fail[s] to [reveal] any evidence that conference was ever held on the property") (JA40); Second Division Award, No. 12475 (Nov. 4, 1992) (dismissing case without deciding merits where "there is nothing in the record to establish that a conference was held on the property") (JA42); Third Division Award, No. 30821 (Apr. 27, 1995) (dismissing case without reviewing merits where "[n]owhere does the record indicate that a conference was ever held or requested on the property") (JA57); *cf.* First Division Award, No. 26738 (Feb. 5, 2009), *available at* http://kas.cuadra.com/star/images/nmb/nm00014746.pdf ("There is no evidence in the record to confirm that a conference was ever held to discuss the matter"; "prior Awards have held that the failure to conference is a jurisdictional defect that precludes the Board's consideration of the claim" (citing prior awards including one of the awards on appeal here)).

The Seventh Circuit recognized this long line of consistent Board awards but nevertheless concluded that the panel below somehow announced a "new" rule because: (1) Board awards are not precedent, and (2) the above-cited awards failed to clearly state whether conferencing had *in fact* occurred despite the absence of evidence of such in the record. Neither ground withstands scrutiny.

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[13] Appellate courts can, in their discretion, permit a party to supplement its jurisdictional allegations on appeal. 28 U.S.C. §1653. But a denial of such discretionary leave to supplement does not violate due process.

First, while short of binding *stare decisis* effect, Board awards do have some precedential value and are viewed by other panels as persuasive authority. *See, e.g.*, Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J. 567, 581-84 (1937). Garrison, an early commentator who had himself served as a neutral on a number of Board panels, explained the relative weight given to Board awards—starting with "[a] previous award by the same Division before which the case is pending," followed shortly thereafter by "[a] previous award by another Division of the Board." *Id.* at 581-82.[14] Although "this order of importance is not a fixed one and has not consciously been adopted by the Board, ... it expresses fairly accurately the prevailing instincts of the members." *Id.* at 582.

This somewhat informal but nevertheless common and accepted practice continues to the present day. Board awards regularly cite prior decisions as authority for the propositions stated or rulings made therein. *See, e.g.*, First Division Award, No. 26738,

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[14] This Court has cited the Garrison article as persuasive authority on several occasions. *See, e.g., Consolidated Rail Corp.*, 491 U.S. at 305; *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 243 n.6 (1950); *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 714 n.4 (1945); *id.* at 751 (Frankfurter, J., dissenting) (describing Garrison as "one of the most discerning students of railroad labor relations").

supra; Second Division Award, No. 12517 (Mar. 3, 1993) (JA47); Third Division Award, No. 33916 (Jan. 24, 2000) (JA59); Fourth Division Award, No. 4931 (Sept. 22, 1994) (JA52). And parties rely on prior awards in arguing to the Board. *See* National Railroad Adjustment Board Uniform Rules of Procedure (Revised June 23, 2003) at 1, *available at* http://www.nmb.gov/arbitration/nrab-rules.pdf (instructing parties on how to include prior awards as exhibits "[w]hen excerpts ... are quoted within a Submission"); *cf.* Garrison, *supra*, at 578 (noting that carriers' and employees' written submissions to the Board often include "appeals to precedents").

This Court too relies on Board awards as an important and persuasive interpretive aid. In *Hawaiian Airlines, Inc. v. Norris*, for example, the question presented was whether the use of the word "or" in the statutory phrase "'disputes ... growing out of grievances, *or* out of the interpretation or application of [collective bargaining agreements]'" meant that the two clauses were to be read in the disjunctive as applying to two different types of disputes, or as synonyms describing the same type of dispute. 512 U.S. at 254-55 (quoting 45 U.S.C. §153 First (i)). Concluding that the answer was the latter, this Court relied in part on the interpretation given to the statute in various Board awards: "Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights." *Id.* at 254-55 (citing awards); *see also Day*, 360 U.S. at 552 & n.2 (citing several awards adjudicating claims of retired employees before endorsing the "uniform" and "settled administrative interpretation that the Board has jurisdiction over [a retired employee's] claim for compensation").

In short, "[p]recedents established by [Board panels], while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." *Slocum v. Del., Lackawanna & W. Ry. Co.*, 339 U.S. 239, 243 (1950); Garrison, *supra*, at 593 (describing the NRAB as a "quasi-judicial tribunal developing its own common law" to bring about "uniform interpretation[s]"). Thus, even if prior Board decisions do not function exactly like precedent in common law adjudication, they clearly suffice to put litigants on notice that a particular ruling or interpretation is reasonably foreseeable—which would solve any conceivable due process notice problem.[15] The Seventh Circuit's reasoning would find the announcement of a "new rule," and a violation of due process, any time the Board interprets the RLA or Circular One in circumstances where their meaning is debatable among lawyers—even if the Board has already confronted the same issue, and resolved it the same way, a hundred times. That is an absurd result. In such a world, the Board would only be able to function if the written rules themselves were so detailed, complex, and festooned with illustrations and examples as to answer any possible ambiguity up front. Such an elaborate body of rules would read like the Justinian Codex or the Napoleonic Code, rather than the simple and straightforward terms contained in the RLA and Circular One. And if, by chance, a situation somehow happened to arise which was not addressed by that complex code, the Board would be left unable to function. That cannot be the law.

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[15] In some extremely narrow circumstances, this Court does require "fair warning" of unexpected interpretations of the law, principally in the context of interpreting the substantive scope of criminal statutes. There the issue is always whether the court's ruling was *foreseeable* in light of the interpretive materials available to the defendant. *See, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 461, 463 (2001) (where several jurisdictions had already abolished the common law "year and a day" rule, state court's retroactive application of decision abolishing rule could not be said to be "unexpected and indefensible").

Second, the Seventh Circuit finely parses prior Board awards to ferret out whether those dismissals were based on the failure to include *evidence* of conferencing in the record—or an affirmative finding that no conferencing occurred. The Seventh Circuit adopted an unreasonably cramped reading of the prior awards. In each award, the dispositive question as articulated by the panels themselves was whether *the record* contained evidence of conferencing. *See supra* at 42. That the panels (in their rather brief opinions) did not explicate whether or not conferencing actually occurred suggests that the underlying facts were not available and/or were not relevant to the disposition. At the very least, the existence of these awards put the parties on notice that a case in which the record does not contain evidence of conferencing is subject to dismissal—and that a later panel may well apply these prior awards to a case where conferencing supposedly occurred. As such, the rule certainly was not "new" or surprising in any legally relevant respect.

Finally, the Seventh Circuit's opinion also suggests that due process was violated because the Board allowed the Carrier to raise its jurisdictional objection after the initial submissions, while not allowing

Respondent to supplement the appellate record in response. The Seventh Circuit's apparent concern about delay or "sandbagging" makes little sense in light of the substance of the Board's ruling—which was that jurisdiction was lacking because Respondent's *initial* submission omitted crucial jurisdictional facts. The Board would have ruled exactly the same way if identifying that defect had been the very first thing that the Carrier said to the Board. Any delay in identifying the issue did not, in other words, prejudice Respondent in any way. In any event, it was hardly unforeseeable that the Board might permit a party to raise a concern about the Board's jurisdiction at any time. Prior Board awards consistently permitted that, and panels uniformly dismissed when jurisdiction was lacking. *See, e.g.*, Fourth Division Award, No. 4931 (Sept. 22, 1994) (observing that "jurisdictional issues can be raised at any time" and dismissing where lack of conferencing was raised for first time before neutral referee) (JA54-55); Second Division Award, No. 12517 (Mar. 3, 1993) ("[E]ven though the Organization argues that it comes late, this Board has uniformly held, on all Divisions, that issues of jurisdiction may be raised at any time.") (JA50-51). Courts (including this one) likewise permit and indeed encourage the belated identification of jurisdictional defects.

B. The Board Properly Applied Its Rule Of Decision To The Cases Under Review

Even if this had been the first case in which a Board panel confronted the issue of whether the record must contain evidence of on-property conferencing, the Board's resolution of that question (either way) would not constitute the announcement of a "new rule" in any sense that could create a due process violation. What happened here is nothing but the ordinary retroactivity inherent in any adjudicative process—and not even a particularly striking or troubling example. New decisions are normally applied to the parties at hand (*i.e.*, "retroactively") rather than only to parties filing claims in the future (*i.e.*, "prospectively"). This is consistent with the common law fiction that because courts simply declare what the law has always been, parties have no right to claim surprise. *See, e.g.*, William Blackstone, 1 *Commentaries* 69 (1765) (the duty of the court is not to "pronounce a new law, but to maintain and expound the old one"). This approach "reflects the declaratory theory of law, according to which the courts are understood only to find the law, not to make it." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535-36 (1991) (Souter, J.) (citing *Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965)); *Beam*, 501 U.S. at 549 (Scalia, J., concurring). Nothing unusual or troubling happened here.

First, the Seventh Circuit's characterization of the Board's holding as a "new rule" is a serious overstatement. The Board did not invent the requirement of evidence of on-property conferencing from whole cloth. The statutes and regulations expressly state that "[a]ll disputes ... shall be considered ... in conference," 45 U.S.C. §152 Second, that a party seeking Board review must include "a full statement of the facts and all supporting data bearing upon the disputes," *id.* §153 First (i), and that "[n]o petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934," 29 C.F.R. §301.2(b). A requirement that the petition must include a "full statement of the facts" showing that "the subject matter has been handled in accordance with the [RLA]" which requires "[a]ll disputes" to be "considered ... in conference" is a straightforward reading of the governing text. Indeed, as the Seventh Circuit explained, BLET ultimately conceded that (1) parties cannot proceed to arbitration without first meeting in conference, and (2) "parties to arbitration must present all of their evidence to the Board in the on-property record." Pet.App.12a. At most, the Board's decision here resolves the sort of interstitial ambiguity that is *always* present whenever general rules must be applied to particular facts.

"A basic distinction must be recognized between (1) new applications of law or policy, clarifications, and additions, and (2) substitution of new law or policy for old law or policy that was reasonably clear. Only the second raises problems of fairness to those who have relied on the old law." 2 Richard J. Pierce, *Administrative Law Treatise*, §13.2 (4th ed. 2002). For example, in *United Food & Commercial Workers Int'l Union, Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), the NLRB developed and applied a new test to determine whether the employer's decision to relocate certain operations was subject to a statutory duty of collective bargaining. In upholding the retroactive application of this new standard to the employer, the court acknowledged its "consistent willingness to approve the retroactive application of rulings that do not represent an 'abrupt break with well-settled policy' but merely 'attempt to fill a void in an unsettled area of the law.'" *Id.* at 34 (citation omitted). The D.C. Circuit also observed that "where an agency ruling seeks only to clarify the contours of established doctrine, we will almost *per force* allow its retroactive application." *Id.* at 35.

Second, even for decisions that genuinely *do* announce a "new rule," in the sense of a dramatic innovation or a clear break from prior law, this Court has in recent years moved very close to adopting a rule of absolute retroactivity in the context of judicial adjudication. *See Beam*, 501 U.S. 529; *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). This trilogy of cases ultimately garnered a majority to overrule *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in so far as that case permitted "selective retroactivity"—*i.e.*, a holding that applies to the parties before it but not to other cases pending at the time of decision. *See Reynoldsville Casket Co.*, 514 U.S. at 752 ("[Respondent] concedes that *Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law."). This Court described *Harper* as establishing a "firm rule of retroactivity" for judicial decisions. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 278 n.32 (1994).[16]

As Chief Judge Easterbrook and Judge Posner recognized below in their opinion concurring in the denial of rehearing *en banc*, "[l]awmaking in the course of adjudication is a staple of any common-law system, and rules adopted in that fashion apply not only to the parties but also to all similar cases." Pet.App.45a (citing *Beam*, 501 U.S. 529). This is true whether the changes are substantive or procedural. And it remains the rule even when the decision cuts off a party's access to the tribunal, and even when the party's claim would have been viable before the decision. For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, this Court announced a new, uniform federal statute of limitations for securities actions and dismissed hundreds of proceedings in which plaintiffs, relying on older law, delayed in filing suit. 501 U.S. 350 (1991); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (modifying federal pleading requirements and throwing out a complaint that was deemed sufficient under the earlier standard); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (upholding decision invalidating state law tolling provision under which the complaint would have been timely and dismissing the complaint on statute of limitations grounds).

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[16] Although these cases do not decide the issue of "pure prospectivity" (*i.e.*, a decision that does not even apply to the case under review), it seems unlikely that approach remains viable. *See Beam*, 501 U.S. at 547 (Blackmun, J., concurring); *id.* at 548 (Scalia, J., concurring); Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1102 & n.164, 1112 & n.197, 1130 (1999).

The rule is similar for "new" rules announced in the course of agency adjudication. This Court recognized long ago that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). And, in the NLRB context, this Court has repeatedly recognized agency authority to announce new rules in adjudicative proceedings—and even to do so exclusively through adjudication.[17] The presumption is that such rules or interpretations apply to the parties before the agency, as well as to cases pending at the time of decision. *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281-82 (1969) (noting the "general rule" of retroactivity).

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[17] *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (observing that the NLRB "has chosen to promulgate virtually all the legal rules in its field through

And the rule is no different for decisions by arbitrators—including decisions about arbitrability or the scope of the arbitrator's authority. This Court has repeatedly held that arbitrators must decide debatable procedural issues which bear on the arbitrability of a dispute, and apply their resolution of such issues to the case at hand.[18] Whether the NRAB is analogized to a judicial tribunal, an administrative agency, or an arbitral panel, the analysis remains the same.

This Court's decision in *Sheehan* vividly illustrates the operation of these rules. In *Sheehan*, a railroad employee filed a wrongful discharge suit in state court. While that action was pending, this Court decided

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adjudication rather than rulemaking"); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974) ("The views expressed in [*Chenery*] ... make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

[18] *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555, 557 (1964) (arbitrator to decide whether union's failure to conference the dispute precluded review of claim); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (reaffirming that arbitrators are to decide issues of procedural arbitrability including whether a National Association of Securities Dealers' six-year time limit barred plaintiff's claim); *United Paperworkers Int'l Union*, 484 U.S. at 39-40 (affirming arbitrator's application of an evidentiary rule announced in prior decisions to exclude evidence in the case under review).

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972), which overruled prior precedent and held that such disputes could only be submitted to a adjustment board. Since that decision was applied retroactively, Sheehan dismissed his now-invalid state law claim and attempted to institute a proceeding before the NRAB. The Board held that Sheehan's claim was untimely. None of that was Sheehan's fault, and the Tenth Circuit found a due process violation in the fact that the Board did not consider equitably tolling the limitations period in light of the retroactive impact of *Andrews*. This Court *summarily reversed.*

Third, and finally, even if there were a plausible argument that the Board should not have applied its evidentiary ruling retroactively to Respondent here, any resulting error simply would not sound in due process. Even when this Court's case law was more concerned about the potential unfairness of adjudicatory retroactivity, it did not suggest that retroactive application of new interpretations (including genuinely "new rules") would violate *due process*. "Those Justices who defended adjudicative nonretroactivity based on considerations of fairness, notice, and reliance never argued that these factors were of constitutional magnitude," which "is not surprising, given that adjudicative retroactivity was the exclusive practice for most of the period during which due process limitations would likely have been developed." Jill E. Fisch, *Retroactivity and Legal*

Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1075 (Mar. 1997).[19]

However characterized, the Board panel's application of its evidentiary ruling to the parties in this case presents no issue of constitutional magnitude. The Seventh Circuit wrongly mistook an unremarkable—in fact, notably mild—example of the ordinary retroactivity inherent in any adjudicative process for a violation of due process of law. Its ruling gives Respondent rights that no other litigant in any judicial or administrative forum has ever had, and does so in a context where judicial review is supposed to be "'among the narrowest known to the law.'" *Sheehan*, 439 U.S. at 91 (citation omitted). Respondent received notice (including fair warning of the possibility of the precise holding that ultimately doomed its petition), and a full and fair opportunity to be heard before unbiased decisionmakers. Due process requires nothing more.

CONCLUSION

The decision of the Seventh Circuit should be reversed and the NRAB panel awards should be reinstated.

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[19] Indeed, the only genuine *constitutional* issue in this area is the risk that purely *prospective* application of judicial rulings would violate the Article III "case or controversy" requirement or separation of powers considerations. Fisch, *supra*, at 1075.

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ADDENDUM

TABLE OF CONTENTS TO ADDENDUM

45 U.S.C. § 153 First (b), (c), (g), (n), (p) 1a

45 U.S.C. § 159 Third 4a

29 C.F.R. § 301.2(b) 5a

45 U.S.C. § 153

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

* * *

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

* * *

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

* * *

45 U.S.C. § 159

§ 159. Award and judgment thereon; effect of chapter on individual employee

* * *

Third. Impeachment of award; grounds

Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

* * *

Code of Federal Regulations
Title 29. Labor
Subtitle B. Regulations Relating to Labor
Chapter III. National Railroad Adjustment Board
Part 301. Rules of Procedure

§ 301.2 Classes of disputes.

* * *

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

RESPONDENT'S BRIEF

No. 08-604

In The
Supreme Court of the United States

◆

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
AND TRAINMEN GENERAL COMMITTEE
OF ADJUSTMENT, CENTRAL REGION,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 17

ARGUMENT 19

I. FEDERAL COURTS CONTINUE TO HAVE JURISDICTION TO REVIEW NRAB DECISIONS FOR VIOLATIONS OF PROCEDURAL DUE PROCESS 19

A. While the Organization has also challenged these awards on statutory grounds, due process review is especially appropriate when an NRAB panel makes up a new procedural requirement to dismiss cases without a hearing under the CBA 19

B. Long before there was statutory review of NRAB actions, the federal courts recognized the right to review such actions for violations of due process 21

C. In amending the RLA in 1966 to provide statutory review, Congress did not use any language or express any intent to strip the courts of their constitutional jurisdiction 25

TABLE OF CONTENTS – Continued

Page

D. *Union Pacific Railroad Co. v. Sheehan* did not rule out due process review 33

E. Due process fits the statutory scheme and federal labor policy 36

II. BY USING A RULE OR REQUIREMENT NEVER BEFORE APPLIED AND DISMISSING THE FIVE CASES WITHOUT ANY HEARING UNDER THE CBA, THE NRAB PANEL VIOLATED ORGANIZATION'S RIGHT TO DUE PROCESS 37

A. The Organization had no hearing or decision of its contractual claims under the CBA 38

B. The NRAB panel acted without any legal authority in dismissing these cases without any hearing or decision of these claims under the CBA 39

C. Carrier would not have been prejudiced by consideration of this evidence, and the Organization had no reasonable notice that it would have to submit evidence of conferencing 43

D. Individual NRAB panels cannot engage in "rule making by adjudication." 47

TABLE OF CONTENTS – Continued

Page

III. THE COURT MAY VACATE THESE AWARDS ON THE STATUTORY GROUND THAT THE NRAB PANEL HAD NO AUTHORITY TO DISMISS THESE CASES AND THEREBY FAILED TO "CONFINE OR CONFORM" ITSELF TO ITS PROPER AND LIMITED JURISDICTION UNDER THE RLA 52

CONCLUSION 54

TABLE OF AUTHORITIES

Page

CASES

Allain v. Tummon, 212 F.2d 32 (7th Cir. 1954) 24

Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972)...22

Armstrong Lodge No. 762 v. Union Pacific Railroad Co., 783 F.2d 131 (8th Cir. 1986) 35

Barnett v. Pennsylvania-Reading Seashore Lines, 245 F.2d 579 (3d Cir. 1957)........21, 24, 25, 39

Bell v. Hood, 327 U.S. 678 (1946) 23

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)..51

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986).............................26

Brotherhood of Railroad Trainmen v. Central of Georgia Ry., 415 F.2d 403 (5th Cir. 1969)...............31

Brotherhood of Railroad Trainmen v. Chicago R. I. R. Co., 353 U.S. 30 (1957)...............................22

Brotherhood of Railroad Trainmen v. Templeton, 181 F.2d 527 (8th Cir. 1950) 21, 25, 39

Butler Armco Independent Union v. Armco Inc., 701 F.2d 253 (3d Cir. 1983).....................................49

Califano v. Sanders, 430 U.S. 99 (1977) ... 17, 26, 28, 35

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984)...43, 48

Chicago, Rock Island & Pacific Railroad Co. v. Wells, 498 F.2d 913 (7th Cir. 1974)....31, 33, 36, 44, 52

TABLE OF AUTHORITIES – Continued

Page

Dahlberg v. Pittsburgh & L.E.R. Co., 138 F.2d 121 (3d Cir. 1943) 24

D'Elia v. New York, New Haven & Hartford Railroad Co., 230 F. Supp. 912 (D. Conn. 1964) 27, 39

D'Elia v. New York, New Haven & Hartford Railroad Co., 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 423 U.S. 1016 (1965) 21, 25, 38

Demore v. Kim, 538 U.S. 510 (2003) 26

District Lodge 64 Int'l Assn'n of Aerospace Workers v. NLRB, 949 F.2d 441 (D.C. Cir. 1991) 50

Edelman v. Western Airlines, 892 F.2d 839 (9th Cir. 1989) 32, 35

Edwards v. Capital Airlines Inc., 176 F.2d 755 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 885 (1949) 25, 39

Edwards v. St. Louis – San Francisco Railroad Co., 361 F.2d 946 (7th Cir. 1966) 21, 33, 38

El Dorado Technical Services, Inc. v. Union General De Trabajadores De Puerto Rico, 961 F.2d 317 (1st Cir. 1992) 49

Elgin, J. & E. Railway Co. v. Burley, 327 U.S. 661 (1946) 48

Elgin, J. & E. Railway Co. v. Burley, 325 U.S. 711 (1945) 25

Ellerd v. Southern Pacific Railroad Co., 241 F.2d 541 (7th Cir. 1957) 21, 24, 39

Page

Elmore v. Chicago & Ill. Midland Ry., 782 F.2d 94 (7th Cir. 1986) 22

Hargis v. Wabash Railroad Co., 163 F.2d 608 (7th Cir. 1947) 24

Hayes v. Western Weighing & Inspection Bureau, 838 F.2d 1434 (5th Cir. 1988) 35

Henry Bierce Co. v. NLRB, 23 F.3d 1101 (6th Cir. 1994) 45

Hornsby v. Dobard, 291 F.2d 483 (5th Cir. 1961) 25, 39

International Ass'n of Machinists & Aerospace Workers v. Metro North Commuter Railroad & Transport Workers Union, 24 F.3d 369 (2d Cir. 1994) 36

James Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 50, 51

Johnson v. Robison, 415 U.S. 361 (1974) 26

Kotakis v. Elgin, J. & E. Railway, Co., 520 F.2d 570 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975) 33

Laborers' Intern. Union of North America, AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375 (3d Cir. 1994) 50

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 50

Marbury v. Madison, 5 U.S. 137 (1803) 23

TABLE OF AUTHORITIES – Continued

Page

McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) 28

Mitchell v. Union Pacific Railroad Co., 408 F.3d 318 (7th Cir. 2005) 22

NLRB v. Complas Industries Inc., 714 F.2d 729 (7th Cir. 1983) 45

NLRB v. Wyman Gordon Company, 394 U.S. 759 (1969) 49

Pennsylvania Railroad Co. v. Day, 360 U.S. 548 (1959) 24, 27, 29

Radin v. United States, 699 F.2d 681 (4th Cir. 1983) 35

Rosen v. Eastern Air Lines, 400 F.2d 462 (5th Cir.), *cert. denied*, 394 U.S. 959 (1968) 33

SEC v. Chenery, 318 U.S. 80 (1943) 49

Shafii v. PLC British Airways, 22 F.3d 59 (2d Cir. 1994) 32, 35

Sheehan v. Union Pacific Railroad Co., 576 F.2d 854 (10th Cir.), *rev'd on other grounds*, 439 U.S. 89 (1978) 22

Southern Pacific Co. v. Wilson, 378 F.2d 533 (5th Cir. 1967) 33

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 31

System Federation, et al. v. Braidwood, 284 F. Supp. 611 (N.D. Ill. 1968) 36

TABLE OF AUTHORITIES – Continued

Page

Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978) 17, 33, 34, 35, 48

Union Pacific Railroad Co. v. Price, 360 U.S. 601 (1959) 17

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 42

U.S. v. Mead Corp., 533 U.S. 218 (2001) 43

Utah v. Evans, 536 U.S. 452 (2002) 26

Walker v. Southern Ry. Co., 385 U.S. 196 (1966) 22

Webster v. Doe, 486 U.S. 592 (1988) 17, 26, 28

Wyman-Gordon Co. v. United Steelworkers of America, 613 F. Supp. 626 (N.D. Ill. 1985) 49

W.R. Grace & Co. v. Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers, 461 U.S. 757 (1983) 31

STATUTES

45 U.S.C. §152 Second 6

45 U.S.C. §153 7

45 U.S.C. §153 First (a) 8

45 U.S.C. §153 First (f) 38

45 U.S.C. §153 First (g) 9

45 U.S.C. §153 First (h) 8

45 U.S.C. §153 First (i) 1, 9, 10

45 U.S.C. §153 First (j) 32, 40

TABLE OF AUTHORITIES – Continued

Page

45 U.S.C. §153 First (k) 8

45 U.S.C. §153 First (l) 8, 9, 22

45 U.S.C. §153 First (q) .... *passim*

45 U.S.C. §153 First (s) 9

45 U.S.C. §153 First (u) 9, 22

45 U.S.C. §153 First (v) 1, 6, 10, 43, 48

29 C.F.R. §301 .... 1, 7, 10

29 C.F.R. §301.5 .... *passim*

29 C.F.R. §301.6(a) 11

ADMINISTRATIVE MATERIALS

National Railroad Adjustment Board, First Division, Award No. 23867 51

National Railroad Adjustment Board, Second Division, Award No. 5074 51

National Railroad Adjustment Board, Second Division, Award No. 15719 49

OTHER AUTHORITY

Jacob Seidenberg, "Grievance Adjustment in the Railroad Industry," *The Railway Labor Act at Fifty,* pp. 220-221 (National Mediation Board, 1977) 49

STATEMENT OF THE CASE

Procedural History

On March 15, 2005, a panel of the First Division of the National Railroad Adjustment Board (NRAB) dismissed the cases of five locomotive engineers for "lack of jurisdiction" allegedly under the federal regulations known as Circular One, now codified in 29 C.F.R. Part 301.[1] Pet.App.65a-107a. With identical reasoning, the NRAB panel dismissed all five cases for failure to put evidence as to conferencing in the original submissions filed by the union pursuant to Circular One, which is codified in relevant part in 29 C.F.R. §301.5. *Id.* The NRAB panel based the dismissals on Circular One without interpreting or applying the parties' collective bargaining agreement ("CBA"). Pet.App.70a-71a, 78a-79a, 86a-87a, 94a-95a, 102a-103a. On April 22, 2005, the union, the respondent Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region (the "Organization"), filed a petition in United States District Court for the Northern District of Illinois to require the NRAB panel to hear and decide the cases according to the terms of the parties' CBA, as provided by the Railway Labor Act ("RLA"), 45 U.S.C. §153 First (i).

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[1] Congress authorized the full NRAB, i.e., the privately appointed members, to engage in a one-time rulemaking within forty days of June 21, 1934. 45 U.S.C. §153 First (v). Circular One was the result of this rule-making.

The Organization sought to set aside the NRAB panel's dismissal on both statutory and constitutional grounds. JA-20-21. On the statutory ground, the Organization alleged that the NRAB panel failed to "conform or confine itself to matters within the scope of the Division's jurisdiction," as required by 45 U.S.C. §153, First (q). JA-34-38. It alleged that the NRAB panel violated this statutory provision – and exceeded its jurisdiction – because it effectively created a new requirement that the Organization must always prove conferencing even when the Carrier had not disputed it, when there was no legal basis for such a rule in the RLA or Circular One. *Id.* Refusing to consider the Organization's evidence that conferences did in fact occur, the NRAB panel unlawfully dismissed these cases without any resolution of the contractual claims in the CBA. *Id.* On the constitutional due process ground, the Organization alleged that by acting without notice to apply such a requirement, which has no basis in the RLA or Circular One, the NRAB panel denied the Organization a fundamentally fair hearing in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. JA-25-34.

The defendant Union Pacific Railroad Company (the "Carrier") filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. JA-10; Pet.App.30a. It selectively attached various arbitration awards outside the record and which were not readily available to the Organization's representatives at the time of the hearing before the NRAB. *See, e.g.,* Pet.App.71a. The Carrier did not rely on the parties' CBA, which was never interpreted or applied in these cases.[2] On May 15, 2006, the District Court granted Carrier's motion to dismiss. Pet.App.24a-42a.

On June 5, 2006, the Organization filed an appeal to the United States Court of Appeals for the Seventh Circuit. On April 9, 2008, the Seventh Circuit reversed the District Court. Pet.App.1a-23a. As stated by the Seventh Circuit, the controlling issue was whether "written documentation of the conference in the on-property record [is] a necessary prerequisite to arbitration before the NRAB." Pet.App.6a. The Seventh Circuit stated: "Although presented through both a statutory and constitutional framework, the essence of the conflict boils down to [this] single question." *Id.* It found that "no statute, regulation, or CBA required the evidence [of conferencing] to be presented in the on-property record" attached by the Organization in its original submission. Pet.App.23a.

The Seventh Circuit carefully reviewed the arbitration awards cited by the Carrier and found that they were neither on point nor were they binding authority. Pet.App.13a-17a. The Seventh Circuit found the NRAB panel had acted without any legal basis in excluding the evidence of conferencing. It further found the Carrier would not have been prejudiced by the consideration of this evidence at the hearing stage. And it found the Organization itself had been prejudiced by the Carrier's failure to object to any issue relating to conferencing when the cases had been submitted years before. Based on this denial of due process, the Seventh Circuit reversed the decision of the District Court. Pet.App.23a. The Seventh Circuit noted the statutory claim but stated that the adjudication of the due process claim was "unavoidable." Pet.App.7a.

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[2] The relevant portion of the CBA, the "System Agreement – Discipline Rule," was attached by the Organization to its complaint in the District Court, was transmitted to the Seventh Circuit in the Record on Appeal, and is included in the addendum to this brief.

On April 23, 2008, the Carrier filed a petition for rehearing and rehearing *en banc* on the ground that the court of appeals had no jurisdiction to review the actions of the NRAB panel for violations of due process. On August 11, 2008, the three-judge panel of the Seventh Circuit denied the petition for rehearing, and no judge called for a vote for rehearing *en banc*. Pet.App.43a. In a separate concurrence, however, two judges not on the original panel offered their view that the NRAB panel had done nothing more than engage in "rule making by adjudication." Pet.App.45a. Furthermore, they stated it would not violate the Due Process Clause to impose the new rule retroactively. *Id.* Neither voted to grant the *en banc* petititon. On November 5, 2008, the Carrier filed a petition for certiorari seeking review of only two questions: (1) whether the federal courts have jurisdiction to review decisions of an NRAB panel for violations of the United States Constitution, and (2) whether the Seventh Circuit erred in finding that the NRAB panel violated the Due Process Clause in dismissing these cases.

The Contractual Grievance Procedure Prior to the NRAB Filings

At various times in 2002 and 2003, the Carrier fired Engineer B.L. South, Engineer R.E. Whatley and Engineer C.C. Fosha. Pet.App.73a-80a, 81a-88a, 89a-96a. It also disciplined Engineer L.G. Glueck and Engineer M.L. Pope. Pet.App.65a-72a, 97a-104a. In all five cases, the Organization filed grievances and sought reinstatement and back pay for the fired engineers and the removal of discipline for the others. Prior to appearing before the NRAB panel the parties handled the grievances under their CBA, known as the "System Agreement – Discipline Rule, 1996." Pet.App.65a-107a.

As to each discharge or discipline, the Carrier and the Organization held the hearing required by the CBA before an "investigating officer." App. 5. This "investigating officer" is not an impartial decision maker, but one of the Carrier's own supervisors. This "investigating officer" conducts the hearing "on the property," i.e., he conducts an oral hearing at which contested facts are presented, and are tested by the adversarial process. App. 5. At such hearings, both the engineer (and the Organization as representative) and Carrier can call and cross examine witnesses and introduce documents. App. 5. After the hearing, the record is transcribed, and under the CBA, another managerial employee, namely, the Carrier's superintendant, must read the transcript, sign and date it, and issue a decision after the date. App. 6.

As in these five cases, the Organization then can appeal the decision of the Carrier superintendant to the "highest ranking" officer at Carrier for labor relations. App. 6. If this appeal is unsuccessful, the Organization may then refer the matter to the appropriate NRAB Division after the parties hold a "conference" in a last attempt to settle the case. 45 U.S.C. §152 Second. The nature of this conference is not defined by statute and is often an informal meeting or even a phone call to see if the case can be resolved before either party files a notice of intent to file a submission with the appropriate NRAB Division. There is no requirement in the RLA that the conference be transcribed. There is no requirement in the RLA that it be documented in writing. There is no reference to proof of conferencing in Circular One, 29 C.F.R. Part 301.

The Organization and Carrier did conference the cases of the five engineers described above; and as the Seventh Circuit found, this fact was not disputed. *See, e.g.*, Pet.App.4a, 101a. Conferencing occurs after the evidentiary hearing has taken place, and all internal appeals have been exhausted. App. 6; 45 U.S.C. §152 Second. The evidentiary record relating to the argumentative facts and the merits is closed by the time conferences occur. Thereafter, the Organization filed the respective "Notices of Intent to File Submission" with the First Division of the NRAB. Pet.App.29a. The Notice of Intent states that the Organization has the "intention" of filing an *ex parte* submission which sets out the "relevant, argumentative" facts as required by Circular One, 29 C.F.R. §301.5(d).

Normally, if conferencing had not occurred, the Carrier would raise an objection at the time of the filing of the Notice of Intent. The Carrier made no objection as to lack of conferencing in any of these five cases. Pet.App.4a. Furthermore, the Carrier made no objection later when it filed its own submission presenting its own statement of the "relevant, argumentative" facts as set out in Circular One which is codified by 29 C.F.R. §301.5. Pet.App.3a. It made no objection until the five cases were presented for oral argument several years after the filing of the Notice of Intent by the Organization. Pet.App.20a-21a.

The National Railroad Adjustment Board

The National Railroad Adjustment Board is the 34 member board established by Congress in the 1934 amendments to the Railway Labor Act. That Act, 45 U.S.C. §153 First, states in relevant part: "There is established a Board, to be known as the 'National

Railroad Adjustment Board,' the members of which shall be selected within thirty days after June 21, 1934. . . ." The NRAB is comprised solely of persons appointed by private representatives of labor and management, i.e., the national railroad unions and rail carriers. 45 U.S.C. §153 First (a). The NRAB consists of four separate divisions, which cover various classes of railroad employees. 45 U.S.C. §153 First (h). The relevant division in this case, the First Division, has jurisdiction over disputes involving engineers, firemen, conductors and other yard service employees of train carriers, and has its principal office in Chicago, Illinois. *Id.*

The distinction between the Divisions and the Adjustment Board as a whole is significant. The NRAB panels which hear cases under the CBA are considered panels of the Division, and their awards are awards of the Division. 45 U.S.C. §153 First (k). The Adjustment Board as a whole consists of an equal number of management and labor representatives, for a total of 34 members. 45 U.S.C. §153 First (a). By contrast, the individual NRAB panels which hear cases in the First Division consist of only five persons: two "Carrier" Representatives, two "Organization" Representatives, and a Referee or Neutral Member to break a deadlock. 45 U.S.C. §153 First (h), (k), (l). While the individual panels are different from the Adjustment Board as a whole, they perform the day to day work of the NRAB, namely, to decide disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. §153 First (i). The RLA mandates that submission of a dispute to the NRAB is the exclusive remedy for these "minor disputes" regardless of the parties' preferences. *Id.*

The National Mediation Board is the federal agency which funds and staffs the operations of the National Railroad Adjustment Board. 45 U.S.C. §153 First (g). The operations of the NRAB are funded specifically by 45 U.S.C. §153 First (u). The federal government, through the NMB, oversees the expenditure of taxpayer funds by the NRAB and its divisions. The National Mediation Board also controls the selection, appointment and payment at government expense of the NRAB's referees. 45 U.S.C. §153 First (l). It sets the daily rates of referee's pay, and determines the propriety of referee's expenses, which also are paid from government funds. *Id.* The NRAB is administered by federal employees operated out of government offices in Chicago, Illinois and Washington, D.C., 45 U.S.C. §153 First (s), (u).

Section 3, First (i) of the RLA, 45 U.S.C. §153 First (i) sets out the functions of the NRAB as follows:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment

> in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> – 45 U.S.C. §153 First (i).

The procedural regulations as to the form and content of the submissions are set out in Circular One, referred to above and codified at 29 C.F.R. Part 301. Circular One is the result of a specific, one-time rule-making by the original members of the Adjustment Board. At the time the Adjustment Board was established, Congress required the entire Board "to meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section." 45 U.S.C. §153 First (v). Circular One is the complete set of rules resulting from this one-time rule-making. It sets out the form and content of the position statements filed by the "employees" and the "carrier" with the NRAB in 29 C.F.R. §301.5, which states in relevant part:

> **Form of submission.**
>
> . . .
>
> (d) Position of employees. Under the caption "position of employees" the employees must clearly and briefly set forth all *relevant, argumentative* facts, including

> all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute (emphasis supplied).
>
> (e) Position of carrier. Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

This provision of Circular One as to what must be in the original submission has no reference to conferencing. As the Seventh Circuit stated, "Section 301.5 of the regulations, therefore likewise fails to provide any rule that evidence of the conference must be presented in the on-property record." Pet.App.18a. Furthermore, the parties are directed by these regulations to provide evidence only as to the "pertinent" facts:

> §301.6 General.
>
> (a) To conserve time and expedite proceedings all parties within the scope of

> the Adjustment Board should prepare submissions in such manner that the *pertinent and related* facts and all supporting data bearing upon the dispute will be fully set forth, thus *obviating the need for lengthy briefs and unnecessary oral discussions* (emphasis supplied).

The Proceedings Before the NRAB Panel

The Carrier did not make any objection to the Organization's Notice of Intent in any of the five cases. Pet.App.3a. Nor did it make any claim of a failure to conference in its original position statements filed with the NRAB panel. Pet.App.21a. Nor did it make any objection about conferencing during the more than two years which elapsed from the filing of the position statements to the date of the hearing in these cases. *Id.* Finally, over two years after the filing of the position statements, the five cases were set for oral argument before a single NRAB panel led by Referee Elliott Goldstein.

On March 18, 2004, when the Organization advocate came to argue these five cases, he found that for the first time the Carrier was raising the objection that the cases had not been conferenced. *See, e.g.,* Pet.App.66a. The Organization advocate protested ("passionately" as the Referee later wrote in the awards) that the parties had held conferences in every one of the cases. Pet.App.4a. The Organization also protested that the Carrier had failed to raise a timely objection when the Organization had filed the

Notice of Intent and had waived the issue. Pet.App.67a. Though the objection had been raised in an untimely manner, the Organization offered to supply written evidence of the conferences here. *Id.*

The Referee then issued an order adjourning the hearing to July 27, 2004, to allow both parties to make additional submissions. *See, e.g.,* Pet.App.69a. At the July 2004 hearing, the Organization offered written evidence of conferencing in these cases, including phone logs and correspondence between the parties. *See, e.g.,* Pet.App.67a-68a. The Carrier was not claiming the parties had failed to conference, but rather that evidence of conferencing was not in the record attached to the Organization's initial submission and that evidence produced in response to the objection could not be considered at the hearing stage. *See, e.g.,* Pet.App.66a.

Based on this argument, the NRAB panel, over the strong dissent of the two Organization Representatives, refused to allow the consideration of the evidence. *See, e.g.,* Pet.App.69a. On March 15, 2005, by a three-to-two vote, the divided NRAB panel dismissed all five cases based on the contention that Circular One requires evidence of conferencing to be included in the original submission, even if there was no timely objection to lack of conferencing. *See, e.g.,* Pet.App.71a-72a. The panel majority did not dispute the Organization's evidence that conferencing had occurred, but stated that the evidence presented by the Organization, "no matter how convincing," could not be considered at this stage because of "Circular

1." *See, e.g.*, Pet.App.69a-71a. The panel majority stated that the Organization had "demonstrated that the conference actually occurred via telephone, on December 10, 2001, following the Organization's December 6, 2001 conference request." *See, e.g.*, Pet.App.67a. The panel further acknowledged that the Organization had "tendered a copy of a telephone log purportedly verifying the General Chairman's attempt to confirm the holding of a conference with Labor Relations." *See, e.g.*, Pet.App.67a-68a. It also noted that there was "subsequent correspondence *prepared by the Carrier* concerning those cases . . . " (emphasis supplied) after December 10, 2001. *See, e.g.*, Pet.App.68a. It acknowledged the BLET's evidence even included "settlement letters." *Id.*

As the panel indicated, the Carrier was not claiming that the parties had failed to conference. *See, e.g.*, Pet.App.66a. Rather, the Carrier argued that under Circular One, evidence of conferencing had to be in the Organization's original position statement, whether or not conferencing had been in dispute. *Id.* The NRAB panel stated in part:

> During the hearing before this Board as regards the instant claim, the Carrier raised a threshold issue concerning the jurisdictional authority of the Board to hear this case. Specifically, the Carrier asserted that, first, *the record* before the Board must contain proof that the matter now before it was actually discussed by the parties in conference before being listed for hearing by the Board. Second, the Carrier argued that

> pursuant to Section 2, Sixth, of the Railway Labor Act, the burden of proving that the conference indeed occurred rested with the moving party, the Organization. Third, based on the Carriers' assessment of the on property record, such record contains absolutely no evidence that the Organization requested a conference or that a conference, in fact, was actually held . . .
>
> – Pet.App.66a, 74a, 82a, 90a, 98a (emphasis supplied).

The panel dismissed the cases by reasoning that "NRAB Circular 1" prohibited the consideration of the Organization's evidence once the position statements had been filed:

> The Board emphasizes that all evidence of the statutorily required conference is *entirely* absent from the on property record, where, in order to be considered by the Board, it must reside. Therefore, the Organization's *belated* production of *supporting evidence, post-hearing in this case, no matter how convincing, cannot be entertained by the Board, given its function as an appellate tribunal . . .*
>
> . . . Indeed, as prior Awards have held, this Board's condoning of an evidentiary process after an appeal to the Board would have been *contrary to the procedural requirements contained in NRAB Circular 1.*
>
> – Pet.App.70a-71a, 78a-79a, 86a-87a, 94a-95a, 102a-103a (emphasis supplied).

The dissent filed by the Organization Representatives denied that Circular One required the exclusion of the evidence where the Carrier had not previously objected as to lack of conferencing. Pet.App.105a-107a. The dissent stated in part:

> The Majority has committed a grave injustice . . .
>
> Reduced to its essentials, the Majority has now concluded that the Division cannot consider any of the evidence showing that a conference was held if that evidence was not part of the property handling at the time the record of the case was closed with the service of a Notice of Intent . . .
>
> New evidence is disallowed by the Board [when] it represents an attempt to blindside one party or the other. It is a function of the Board's appellate nature, which limits it to deciding cases based on the record developed on the property. This situation is vastly different in these Dockets, however, because the conference issue was not raised until long after the records had been closed.
>
> This is the kind of gamesmanship that breeds contempt for the minor dispute process, and the Majority should be ashamed to use it to shield the Carrier from the merits of these cases.
>
> – Pet.App.105a-107a.

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SUMMARY OF ARGUMENT

The Seventh Circuit properly recognized and exercised jurisdiction to review the decision of the NRAB panel for denial of procedural due process under the Fifth Amendment. Federal courts have exercised this jurisdiction for over fifty years – and before any provision for statutory review of NRAB actions under the RLA. In the 1966 amendments providing statutory review of NRAB actions, Congress sought to expand and not limit the pre-existing review by the federal courts under the Due Process Clause. Previously, the jurisdiction for due process review had been recognized by this Court itself in *Union Pacific R.R. Co. v. Price,* 360 U.S. 601, 606 (1959). In the 1966 amendments, there is neither express language nor any statement from a member of Congress showing "clear and convincing" intent, or *any* intent, to strip or preclude this Court's prior claim to jurisdiction. *See Webster v. Doe,* 486 U.S. 592, 603 (1988); *see also Califano v. Sanders,* 430 U.S. 99, 109 (1977). Later, in *Union Pacific v. Sheehan*, 439 U.S. 89 (1978), this Court restricted the use of procedural due process to override an NRAB panel's application of a specific CBA provision; but *Sheehan* never found that due process was unavailable as a ground of review. Significantly, under this Court's canons, which require a "clear and convincing" expression of Congressional intent to preclude constitutional claims, the majority of the Circuits have found no such intent.

Exercising such jurisdiction in this case, the Seventh Circuit properly found that the NRAB panel denied Organization's right to due process when the NRAB panel acted without legal or statutory authority to create a new rule or requirement that Organization had to submit evidence of conferencing in the original submission whether the fact of conferencing was in dispute or not. Pet.App.23a. The Seventh Circuit correctly held that the federal regulation ("Circular One") on which the NRAB panel purported to rely does not even apply to evidence of conferencing and the NRAB panel had no authority to create such a rule. Nonetheless, the NRAB panel unlawfully invoked its own "in-house" rule to dismiss the cases of the five engineers without any interpretation or decision of their claims under the CBA. Such denial of due process was especially egregious when the Organization had no notice that conferencing was in dispute or that such evidence was required when there had been no objection to the lack of conferencing. Nor would Carrier have been prejudiced by the consideration of the evidence at this stage when the Carrier itself had previously failed to object to the lack of conferencing in a timely manner.

Finally, Organization also challenged the dismissals for the failure of the NRAB panel to "confine or conform" itself to its proper jurisdiction, as set out in 45 U.S.C. §153, First (q). In violation of the RLA, NRAB panel unlawfully exceeded its jurisdiction here in applying a new procedural requirement which had no basis in the RLA or

Circular One. Since the Seventh Circuit found that the NRAB panel acted without legal authority in dismissing these cases without resolution of the contract claims, such a finding supports a violation of this statutory ground as well.

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ARGUMENT

I. FEDERAL COURTS CONTINUE TO HAVE JURISDICTION TO REVIEW NRAB DECISIONS FOR VIOLATIONS OF PROCEDURAL DUE PROCESS.

A. While the Organization has also challenged these awards on statutory grounds, due process review is especially appropriate when an NRAB panel makes up a new procedural requirement to dismiss cases without a hearing under the CBA.

In the Seventh Circuit the Organization argued that the NRAB panel's dismissal of these cases, without any resolution of the contractual claims in the CBA, should be set aside *both* for a denial of procedural due process and violation of the RLA, namely, the "failure" of the panel to "confine or conform" itself to its proper jurisdiction. *See* 45 U.S.C. §153 First (q). The Seventh Circuit found the due process claim "unavoidable." Indeed, the facts of this case invite and even call for the use of procedural due process review, which federal courts have been using long before direct statutory review became available in 1966. Such review continues to be especially well suited for procedural violations as in this case, where an NRAB panel created a new "jurisdictional" requirement with no basis in the RLA or Circular One. As the Seventh Circuit found, there was no authority in either the RLA or Circular One for this new requirement, namely, that the Organization had to "prove" conferencing in its original submission (and only there), even if the Carrier had not disputed it. The dismissals on this ground were all the more egregious because the Organization then produced convincing evidence of conferencing, which the NRAB panel also barred. The consideration of such evidence at this stage would not have prejudiced the Carrier, which itself had prejudiced the Organization by failing to raise the issue of conferencing in a timely manner. Furthermore, the Carrier did not deny in the hearing that the parties did conference. The Seventh Circuit was correct to find the whole proceeding as a denial of procedural due process.

This is not a case to review an arbitrator's interpretation of the CBA. The Organization's claims did not get to that point: there was never a resolution of the contractual claims in this case. There is a genuinely constitutional injury when the Organization's contractual claims in the CBA were extinguished without any application of the CBA under a procedural rule created by this NRAB panel without any legal authority to do so. The equity jurisdiction of the federal courts to hear claims of procedural due process is properly invoked to ensure that NRAB panels do their intended job of interpreting the CBA and deciding the contractual claims.

B. Long before there was statutory review of NRAB actions, the federal courts recognized the right to review such actions for violations of due process.

For over sixty years, even before there was any statutory review of NRAB decisions, this Court and the lower courts claimed jurisdiction to review NRAB actions for violations of due process. *See, e.g., Price v. Union Pacific R.R. Co.*, 360 U.S. 601, 616 (1959); *see Ellerd v. Southern Pacific,* 241 F.2d 541 (7th Cir. 1957); *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579 (3d Cir. 1957); *see also Edwards v. Capital Airlines Inc.,* 176 F.2d 755 (D.C. Cir. 1949); *Brotherhood of Railroad Trainmen v. Templeton,* 181 F.2d 527 (8th Cir. 1950). At the time Congress was developing the statutory provisions for direct review of NRAB awards, the federal courts were issuing decisions that recognized their jurisdiction to review such actions on due process grounds. *See D'Elia v. New York, New Haven and Hartford Railroad Co.,* 338 F.2d 701 (2d Cir. 1964).

While not disputed by any of the parties in this case, it is worth emphasizing that an NRAB panel's actions are a form of state action. The Organization is unaware of any court that has ever questioned the existence of state action. This Court has stated that the "compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 320, 323 (1972). As the Court pointed out, "in some situations the Act makes the federal administrative remedy exclusive." *Andrews,* 406 U.S. at 325; *see also Brotherhood of Railroad Trainmen v. Chicago R. I. R. Co.,* 353 U.S. 30 (1957); *Walker v. Southern Ry. Co.*, 385 U.S. 196, 198 (1966); *Elmore v. Chicago & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986).

Accordingly, as noted by this Court in *Andrews,* the NRAB is a "federal administrative" agency. The Carrier concedes that the NRAB awards represent state action. Pet.Br.31. The concession is well warranted. The National Mediation Board staffs and pays for the operations of the NRAB. The NMB determines which persons may serve as possible referees. It sets their rate of pay and determines the propriety of the Referee's expenses, which are also paid by government funds. 45 U.S.C. §153 First (l), (u). The NRAB is administered by federal employees operating out of government offices in Chicago and Washington D.C. The United States Attorneys represents NRAB panels in any federal or state courts in which they may be sued. *See Sheehan v. Union Pacific Railroad Co.,* 576 F.2d 854 (10th Cir.), *rev'd on other grounds,* 439 U.S. 89 (1978); *Mitchell v.*

Union Pacific R.R. Co., 408 F.3d 318 (7th Cir. 2005). The NRAB was set up to resolve minor disputes under a mandatory governmental procedure, and the rules set out in Circular One have the status of federal regulations. Indeed, the NRAB panel in this case claimed the authority to interpret Circular One as codified in 29 C.F.R. §301.5 to dismiss these claims without any review under the CBA.

With respect to NRAB actions, then, the federal courts can assert their equity jurisdiction to review or set aside governmental invasions of constitutional rights, including the right to procedural due process. *See Bell v. Hood,* 327 U.S. 678 (1946); *Marbury v. Madison,* 5 U.S. 137 (1803). As set out in the *Price* case of 1959, this Court specifically recognized such constitutional jurisdiction to review NRAB actions for violations of procedural due process. The Carrier in its brief omits a full statement of this important case. In *Price,* the Court held that when an employee "lost" an NRAB arbitration, the employee could not file the same claim anew in state court. In 1959, at a time when federal law did not provide for statutory review, the Court stated that at least procedural due process review was available:

> .... [T]he statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances ... disposed of by the Board, *past* the action under Section 3, First (p) authorized against the non complying carriers ... or the review

> sought of an award claimed to result from a denial of due process of law, see *Ellerd v. Southern Pacific R. Co.,* 241 F.2d 541; *Barnett v. Pennsylvania-Reading Seashore Lines,* 245 F.2d 579, 582.
>
> – *Price,* 360 U.S. at 616 (emphasis supplied).

Likewise, in *Pennsylvania R.R. Co. v. Day*, 360 U.S. 548 (1959), a companion case to *Price,* the dissent took issue with the majority's reading of the RLA but noted the statements of other courts that due process review is available. *Day*, 360 U.S. at note 7.

In the 1957 case of *Ellerd v. Southern Pacific R.R. Co.*, which is cited favorably in *Price,* the Seventh Circuit allowed a plaintiff to sue an NRAB panel for violation of due process. It held "we can conceive of no recourse except to reverse the judgment, so that the court may determine the essential question of whether plaintiff has been deprived of a constitutional hearing. . . ." *See Ellerd,* 241 F.2d at 545. The Seventh Circuit had noted the availability of due process review of NRAB decisions. *See Allain v. Tummon,* 212 F.2d 32 (7th Cir. 1954); *Hargis v. Wabash Railroad Co.,* 163 F.2d 608 (7th Cir. 1947) (citing *Dahlberg v. Pittsburg & L.E.R. Co.*, 138 F.2d 121, 123 (3d Cir. 1943)). Other Circuits also recognized due process review before this Court's decision in *Price*. In *Barnett v. Pennsylvania-Reading Seashore,* also cited favorably in *Price*, the Third Circuit recognized due process jurisdiction and proceeded to cite a host of cases which had reviewed NRAB actions on constitutional grounds. The citations in footnote 2 of *Barnett* include: "*Elgin, J&E Ry. Co. v. Burley*, 1945, 325 U.S. 711 (union before Board not authorized to bind absent employees); *Brotherhood of Railroad Trainmen v. Templeton*, 8 Cir. 181 F.2d 527 cert. denied 340 U.S. 823 (failure to give notice); *Edwards v. Capital Airlines*, 176 F.2d 755 cert denied, 1949, 338 US 885 (conflict of interest between Board members and employees)." *Barnett,* 245 F.2d at 582.

Furthermore, from the decision in *Price* up to the 1966 amendment of the RLA the federal courts continued to review NRAB actions for denial of procedural due process. *See, e.g., Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961); *D'Elia v. New York, New Haven & Hartford R.R. Co.,* 338 F.2d 701 (2d Cir. 1964), *cert. denied*, 423 U.S. 1016 (1965).

C. In amending the RLA in 1966 to provide statutory review, Congress did not use any language or express any intent to strip the courts of their constitutional jurisdiction.

In providing statutory review in 45 U.S.C. §153 First (q), Congress sought to expand – not limit – the existing direct judicial review of NRAB awards. There is no express or implied preclusion of the jurisdiction which had been exercised by the federal courts up to 1966. Both the language of 45 U.S.C. §153 First (q) and its legislative history fall far short of the "clear and convincing" evidence required by this Court to preclude jurisdiction to hear constitutional claims of governmental actions. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *Califano v. Sanders*, 430 U.S. 99 (1977); *Utah v. Evans,* 536 U.S. 452 (2002); *Demore v. Kim*, 538 U.S. 510, 517 (2003); *Bowen v. Academy of Family Physicians*, 476 U.S. 667 (1986); *see also Johnson v. Robison*, 415 U.S. 361 (1974). In *Webster,* this Court stated:

> We emphasized in *Johnson v. Robison,* 415 U.S. 361 (1974) that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Weinberger v. Salfi,* 422 U.S. 749 we reaffirmed that view. We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n. 12 (1986)." (internal citations omitted).
>
> – *Webster,* 486 U.S. at 603.

As this Court stated in *Utah v. Evans,* 536 U.S. at 463, "We read limitations on our jurisdiction to review narrowly. . . . We do not normally read an unexpressed intent to bar jurisdiction that we have previously exercised." This extra caution is important here in light of this Court's recognition of its jurisdiction for due process review in *Price.* It is also significant that several appellate courts were exercising due process review at the very time these amendments were being considered. *See, e.g., D'Elia v. New York, New Haven & Hartford Railroad Co.*, 230 F. Supp. 912 (D. Conn. 1964).

The purpose of Congress in adding statutory review was remedial, i.e., to expand and not to limit direct judicial review. Congress was not concerned that such review had been too intrusive. Rather, Congress recognized that the limited procedural review as claimed in *Price* was insufficient. As noted by the dissent in *Day,* it was unfair to employees not to have some right to review of the substantive merits of these awards. As set out in 45 U.S.C. §153 First (q), Congress added three new grounds for review: (1) violations of the RLA itself, (2) the failure of an order of an NRAB panel "to conform or confine" itself to matters within its jurisdiction, namely, to render an interpretation of the CBA "without foundation in reason or fact," and (3) fraud. Senate Report No. 1201, Judicial review, p. 2287.

In adding the three new grounds, Congress does not say such review is "exclusive," or that "there is no other review," so as even to arguably reach "by implication" the constitutional review which already existed. There is not a word in subparagraph (q) that review under it is "exclusive." Congress did not use "exclusive," "only," or any similar word. Nor is there anything about withdrawing the "equity" jurisdiction previously claimed by the federal courts. In the first sentence of 45 U.S.C. §153 First (q), Congress adds "jurisdiction" – simply adds it – where none had previously existed. "The court shall have *jurisdiction* to affirm the order of the division, to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as the court may direct." (emphasis supplied).

These are words without limitation. This case is not even close to the facial statutory bar of review which this Court found insufficient to preclude its jurisdiction over constitutional claims in *McNary v. Haitian Refugee Center,* 498 U.S. 479, 494 (1991). Here by contrast there is nothing that limits review. In effect the Carrier here falls back on the Latin maxim, "*expressio unius, est exclusio alterius.*" This is a completely inadequate basis under the leading cases to strip this Court of the jurisdiction recognized in cases like *Price.* The "clear and convincing standard" set out by a unanimous Court in cases like *Webster* and *Califano* rule out any use here of "implied" intent to strip this Court and the lower courts of the jurisdiction they had previously claimed or exercised. The Carrier essentially asks this Court to overrule *Webster, Califano,* and a host of other cases and replace it with an "implied" intent doctrine. But even if this Court were to overrule all these cases, there is no such intent that can be implied.

There is not a single remark, not one, by any legislator suggesting any desire to cut back review or roll back the very sparing use of due process. Reviewing this legislative history, no one could seriously claim that in 1966, Congress was somehow on a collision course with the federal courts over due process review. This was no Congressional show-down with the judiciary: it was a peaceful, consensual expansion of review, utterly without controversy. Members of Congress cited and even relied on *Price*, which had also recognized due process review. They relied on *Price* and *Day* to support the view that as a constitutional matter, Congress did not have to extend the same full-fledged review as provided under the Administrative Procedure Act. The House Committee Report, for example, shows that Congress was well aware of *Price*, stating:

> . . . the constitutionality of permitting no review of the decisions of the Board has been upheld, at least as applied to employee claims that have been denied. It would therefore follow that the constitutionality of permitting only limited review should be upheld. For example, in *Union Pacific Railroad v. Price* (360 U.S. 601) and *Pennsylvania v. Day* (360 U.S. 548) the Supreme Court denied judicial relief to employees who had lost their case before the Adjustment Board, despite vigorous dissents pointing to the unfairness . . .
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> – 89th Congress, 1st Session, Report No. 1114.

Of course in upholding the constitutionality of the RLA, *Price* had assumed the existence of due process review. Congress was acting not to eliminate this review but to fill in a gap. It was trying to provide for review of a panel's interpretation of a CBA – a kind of review that cannot be accommodated under the due process clause. Referring to such review of a panel's interpretation of the CBA, the Senate Committee Report submitted by Senator Wayne Morse noted the current lack of such review:

> If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained . . . [T]his result is unfair to employees . . . [B]ecause the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be similar to those grounds commonly provided for review of arbitration awards.
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> – Senate Report No. 1201, Judicial review, p. 2287.

Statutory review would fill that gap and allow very limited review of an interpretation of the CBA:

> The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award 'arbitrariness or capriciousness' on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly *without foundation in reason or fact*, and the

> committee intends that, under this bill, the courts will have that power.
>
> – Senate Report No. 1201, Judicial review, p. 2287 (emphasis supplied).

Accordingly, under the new statutory review, the courts may find that an NRAB panel has "exceeded [its] jurisdiction" when its award has no "foundation in reason or fact." *See Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 415 F.2d 403, 412 (5th Cir. 1969). The courts have interpreted the latter phrase to mean that the award has to "draw its essence from the collective bargaining agreement." *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum and Plastic Workers,* 461 U.S. 757, 764 (quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960)). However, such review applies to an actual interpretation of the CBA which in this case never occurred. The courts have continued to use the due process clause to review the NRAB panel's use or misuse of procedural rules not involving substantive interpretations of the CBA. *See, e.g., Chicago, Rock Island & Pacific Railroad Co. v. Wells,* 498 F.2d 913 (7th Cir. 1974). Congress logically would have taken for granted the continued existence of such review.

If the intent to eliminate the jurisdiction of the courts must be "clear and convincing," it has not been "clear" to the majority of the Circuits. The appellate courts which have looked at the legislative history have found no Congressional intent to eliminate due process review. *Shafii v. PLC British Airways*, 22 F.3d 59 (2d Cir. 1994); *see Edelman v. Western Airlines*, 892 F.2d 839 (9th Cir. 1989). Furthermore, the appropriate use of due process review makes functional sense. Review of procedure complements the statutory review of the merits of a particular CBA interpretation. Certainly the two forms of review can overlap. But they also serve different purposes. The Carrier concedes that the RLA does not provide a remedy for all violations of due process. Pet.Br. 37-38. Due process is especially suited in the narrow class of cases like the instant case where an NRAB panel is involved in misuse of federal regulations – and is avoiding any interpretation of the CBA. Surely Congress did not want to insulate NRAB panels from review in these circumstances.

Finally the claim that Congress wanted some "statutory" due process but not "constitutional" due process has no plausible basis. Certainly the evidence of Congressional intent to divide up the Due Process Clause or this Court's jurisdiction in such a nuanced way is not "clear and convincing." Furthermore, the principal elements of this "statutory due process" were enacted by Congress in 1934, not 1966. *See* 45 U.S.C. §153 First (j). This would seem to entail a showing that Congress actually intended to preclude constitutional claims not in 1966 but in 1934. Such an argument is just untenable.

D. *Union Pacific Railroad Co. v. Sheehan* did not rule out due process review.

After the 1966 amendment to the RLA, the courts, the carriers and the unions all continued to assume that due process review was available. *See, e.g., Rosen v. Eastern Air Lines,* 400 F.2d 462, 464 (5th Cir.), *cert. denied*, 394 U.S. 959 (1968) (*citing Southern Pacific Co. v. Wilson*, 378 F.2d 533 (5th Cir. 1967 and *Edwards v. St. Louis – San Francisco Railroad Co.*, 361 F.2d 946, 953-954 (7th Cir. 1966)); *Kotakis v. Elgin, J. & E. Railway, Co.*, 520 F.2d 570, 574 (7th Cir.), *cert. denied,* 423 U.S. 1016 (1975) (*citing Union Pacific Railroad Co. v. Price*, 360 U.S. 601, 616 (1959)). In the reported cases up to 1978, no party seems even to have made the argument that Congress eliminated due process review. *See, e.g., Wells*, 498 F.2d 913 (7th Cir. 1974). The uncertainty about such review only arose after this Court's decision in *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89 (1978).

In *Sheehan* this Court set aside a Tenth Circuit decision which misused due process to review an NRAB panel's interpretation of the CBA. The Tenth Circuit had invoked "procedural due process" to require an NRAB panel to "toll" or in effect waive a time-limit in the CBA. This was a highly improper use of due process to second-guess the application of an express CBA provision. In a terse *per curiam* opinion, this Court properly balked at this use of due process to toll a provision of the CBA, stating at 92-93:

> If the Court of Appeals' remand was based on its view that the Adjustment Board had failed to consider respondents' equitable tolling argument, the court was simply mistaken. The record shows that the respondent tendered the tolling claim to the Adjustment Board, which considered it and explicitly rejected it. If, on the other hand, the Court of Appeals *intended to reverse the Adjustment Board's rejection* of respondent's equitable tolling argument, the court exceeded the scope of its jurisdiction to review decisions of the Adjustment Board.
>
> – *Sheehan,* 439 U.S. at 92-93 (emphasis supplied).

In short, this Court found that Sheehan himself had received procedural due process, i.e., consideration of his tolling argument and a decision on the merits. But the Tenth Circuit could not use due process to review the NRAB panel's choice to apply the time limits of the CBA. *Sheehan* stands for the proposition that once an arbitrator applies the CBA, there is no due process review of that application. Thereafter, the interpretation of the CBA itself could be reviewed only on one of the three statutory grounds. *See Sheehan,* 439 U.S. at 93.

But *Sheehan* did not hold that due process review was unavailable in all circumstances. On the contrary, three times *Sheehan* cites the *Price* case, which specifically acknowledges procedural due process review. *See Sheehan,* 439 U.S. at 94. This particular use of due process was beyond the jurisdiction of the Tenth Circuit, but in *Sheehan* the Court was not making any major statement that Congress had eliminated due process jurisdiction altogether. This Court's ruling in *Sheehan* was consistent with the limited use of due process jurisdiction before 1966. In the petition for *certiorari* in *Sheehan*, the petitioner – by coincidence, the Carrier in this case – did not even challenge the availability of due process review, and apparently no merits briefs were filed. The Court simply rendered a short *per curiam* opinion. It would not have handled the delicate issue of Congressional removal of jurisdiction in such a cursory manner and so completely inconsistent with cases like *Califano, supra,* decided the year before.

True, a minority of Circuits have interpreted *Sheehan* as precluding due process review. But the Circuits which have examined the question with the most care have held that due process jurisdiction is still available. *See Edelman v. Western Airlines, supra,* 892 F.2d 839, 846-848 (9th Cir. 1989); *see Shafii v. PLC British Airways*, 22 F.3d 59, 63-64 (2d Cir. 1994); *Hayes v. Western Weighing & Inspection Bureau*, 838 F.2d 1434, 1436 (5th Cir. 1988); *Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131, 135 (8th Cir. 1986); *Radin v. United States*, 699 F.2d 681, 684 (4th Cir. 1983) ("procedural deprivation by the arbitrators is ground for relief in the district court"). The Second, Fourth, Fifth, Eighth, Ninth and Seventh Circuits all agree. It is just implausible that the 89th Congress was seeking to oust the courts of this very rare but important use of due process review. It is also implausible that in a short *per curiam* opinion, this Court had ruled out literally decades of procedural due process review without giving a significant discussion of this issue.

E. Due process fits the statutory scheme and federal labor policy.

Due process review of NRAB decisions has now been in effect for over half a century, and is still in effect in the majority of Circuits now. There has been no flood of litigation based on such review. Due process review has a limited role: to review procedural misconduct not involving the merits of an interpretation of the CBA. It is used primarily when an NRAB panel has avoided in some way the interpretation of the CBA or imposed some extraordinary procedural sanction. *See, e.g., International Ass'n of Machinists & Aerospace Workers v. Metro North Commuter R.R.,* 24 F.3d 369 (2d Cir. 1994); *System Federation, et al. v. Braidwood,* 284 F. Supp. 611, 616 (N.D. Ill. 1968) (also citing statutory grounds); *see also Wells,* 498 F.2d 913. While it can complement and overlap with statutory review, it has a special role.

Due process review ensures that NRAB panels conduct hearings under the RLA. There is no basis to believe that Congress wanted to preclude this rare but important use of procedural due process, which is now so established in the case law. The use of due process in rare but important cases promotes federal labor policy by helping to ensure the integrity of this mandatory arbitration process. There is not the slightest reason in law or policy to justify abandoning it.

II. BY USING A RULE OR REQUIREMENT NEVER BEFORE APPLIED AND DISMISSING THE FIVE CASES WITHOUT ANY HEARING UNDER THE CBA, THE NRAB PANEL VIOLATED ORGANIZATION'S RIGHT TO DUE PROCESS.

The facts of this case present a classic violation of procedural due process. First, the Organization was denied any hearing or decision of its claims under the CBA. Second, the NRAB panel had no legal authority under the RLA or Circular One to bar the evidence of conferencing and thereby deny the Organization's right to a hearing. Third, the consideration of the evidence at this stage would have caused no particular prejudice to the Carrier when it had failed to raise a proper objection earlier. As the Seventh Circuit found, evidence of conferencing is not the type of evidence to which any evidentiary bar in Circular One might apply – evidence which Carrier should have received an opportunity to "rebut" in an investigative hearing. Furthermore, the Organization was prejudiced when it was denied reasonable notice that conferencing would be in dispute. Finally, a single NRAB panel has no institutional capacity to engage in rule-making by adjudication in a system where individual arbitration decisions are not binding precedents.

A. The Organization had no hearing or decision of its contractual claims under the CBA.

The NRAB panel misused a federal regulation to dismiss these cases without any hearing or fair process to resolve these contractual claims. The Carrier implies that the investigative hearing was sufficient. Pet.Br.35-36. This investigative hearing may be "adversarial," but it is not before an impartial tribunal. It is conducted by the investigating officer, who is a managerial employee of the Carrier, appointed by the Carrier, and answerable to the Carrier, and who cannot even purport to be a neutral. The ultimate decision is actually made by the Carrier's superintendant, who is also a managerial employee of the Carrier. In none of these cases did the five engineers receive a decision based on the CBA as the Railway Labor Act requires. *See* 45 U.S.C. §153 First (f).

Furthermore, it is well settled that the due process clause does not apply to what the parties do in the contractual grievance procedure prior to consideration by the NRAB. *See Edwards v. St. Louis – San Francisco R.R. Co.*, 361 F.2d 946, 953 (7th Cir. 1966); *D'Elia v. New York, New Haven & Hartford R.R. Co.*, 338 F.2d 701, 702 (2d Cir. 1964). It is the

NRAB's resolution of the dispute which must meet the standards of Due Process. *See Edwards*, 361 F.2d 953 (citing *D'Elia v. New York, New Haven & Hartford R.R. Co.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F.2d 701 (2d Cir. 1964); *Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961); *Ellerd v. Southern Pacific R.R. Co.*, 241 F.2d 541 (7th Cir. 1957); *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579 (3d Cir. 1957); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir. 1950); *Edwards v. Capital Airlines, Inc.*, 176 F.2d 755 (1949)). By extinguishing the contractual claims without any interpretation or application of the CBA, the NRAB panel in this case effectively engaged in a taking of a contractual right without due process.

B. The NRAB panel acted without any legal authority in dismissing these cases without any hearing or decision of these claims under the CBA.

In this case, the Seventh Circuit found that the NRAB panel had no legal authority under the RLA or Circular One to bar the Organization's evidence of conferencing. Pet.App.23a. This evidence of conferencing which was offered by the Organization included correspondence from the Carrier. *See, e.g.*, Pet.App.68a. In fact the parties did conference. The NRAB panel even acknowledged the evidence might be "convincing" but stated that it was required to bar the evidence at the hearing stage by "Circular 1." Pet.App.70a-71a. The Seventh Circuit found that

Circular One did not even apply to this kind of evidence and that the NRAB panel had simply made up a new requirement. Pet.App.21a-23a.

The NRAB panel did not claim that the bar came directly from the RLA. Rather it stated that it was bound instead by "Circular 1." Pet.App.70a-71a. The Carrier's brief generally avoids discussing Circular One. Instead, the Carrier argues that the NRAB panel was applying a general statutory provision set out in 45 U.S.C. §153 First (j). The statutory language to which Carrier points this Court is that "disputes may be referred . . . with a full statement of facts. . . ." The Carrier contends that this use of the word "full" requires the Organization to provide evidence of conferencing in the original submission, whether conferencing is in dispute or not. But a "full statement of facts" could mean a wide range of things. Whatever it may be, this language is certainly not a clear requirement that specific evidence of conferencing must be in the Organization's initial brief.

Furthermore, the NRAB panel did not claim to be interpreting this language – it does not refer to or rely on the language "a full statement of facts" from 45 U.S.C. §153 First (j). Rather the NRAB panel stated that it was barring the Organization's evidence of conferencing because it was required by "Circular 1." But as the Seventh Circuit found, Circular One has nothing to do with evidence of conferencing. Pet.App.18a, 21a.

Circular One, or the relevant part codified as 29 C.F.R. §301.5(d), requires the Organization to present all "relevant, argumentative facts, including documentary evidence submitted in exhibit form. . . ." This same federal regulation also states as follows: " . . . all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made part of the particular question in dispute." As pointed out by the Seventh Circuit, this language makes no sense when applied to evidence of conferencing. A conference can be an informal meeting. It can be a phone call. There is no requirement that the conference has to be documented in writing. It does not have to be transcribed. There is no logical way that a phone call could "have been presented to the carrier and made part of the particular question in dispute." Furthermore, the conference is a last ditch attempt to settle the case after the parties have gone through the contractual grievance procedure. At the time a phone call occurs, the hearing record before the investigating officer has been transcribed and signed. It is problematic to see how a phone call or a meeting can be "made part of the particular question in dispute."

The purpose of Circular One is to provide an opportunity for the other side to "rebut" evidence when it is presented "on the property." Circular One has the purpose of barring "surprise" evidence from being presented for the first time to an NRAB panel. Pet.App.20a-21a. But, as the Seventh Circuit noted, evidence of conferencing is not the kind of evidence which the other side has a right to see and rebut before it goes in the record. Pet.App.18a. The regulation set forth at 29 C.F.R. §301.5(d) was never intended to apply to the proof of an informal step that occurs after the contractual grievance procedure has been completed and well after the evidentiary record from the investigative hearing has been closed.

Accordingly, the Seventh Circuit found that the NRAB panel was simply creating a new requirement not in Circular One to justify the dismissal of these cases without a hearing under the CBA. It was not even a genuine "interpretation" when the regulation being "interpreted" could not logically apply to this class of evidence at all. Likewise, the Seventh Circuit ably distinguished the bar to evidence in this case from a routine evidentiary ruling such as the one at issue in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). In *Misco,* this Court upheld a challenge to an arbitrator's evidentiary ruling in a private arbitration. The court of appeals stated that if the NRAB panel had been applying an already existing rule of evidence as the arbitrator did in *Misco*, it would have deferred to the NRAB panel's decision. Pet.App.8a. But here, the Seventh Circuit noted, the NRAB panel was creating a new administrative rule solely for the purpose of keeping out the Organization's evidence. Pet.App.8a, 22a-23a.

Finally, the NRAB panel has no special competence to interpret either the RLA or any of its implementing regulations, as arguably the entire

Adjustment Board itself could do. The Adjustment Board itself, which has the delegated responsibility for rulemaking, can act only with consent of both the Carrier and Organization representatives: there are no neutrals to break ties for the 34 member Adjustment Board as a whole. A single NRAB panel with a neutral or referee is an entirely different entity and in no position to make the kind of binding interpretations of federal law or even Circular One to which a federal court might defer under *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984) or *U.S. v. Mead Corp.*, 533 U.S. 218 (2001). Congress did delegate a one-time rulemaking authority to the Adjustment Board as a whole, but it did not delegate any such authority to a single Division panel. 45 U.S.C. §153 First (v). Nor does a single Division panel have any particular "agency expertise" since it can consist of five individuals who rarely if ever will serve on such panels. This panel acted without authority to create a new requirement to bar evidence of conferencing and had no legal basis or even a good reason for refusing to decide these contractual claims under the CBA.

C. Consideration of the evidence at the hearing stage would not have caused any particular prejudice to the Carrier, and Organization had no reasonable notice that it would have to submit evidence previously.

The consideration of the Organization's evidence of conferencing at the hearing stage would not have caused any prejudice to the Carrier when the latter had failed to raise the issue properly. Indeed, the Carrier did not dispute that the conferences had occurred. Surely Circular One does not bar evidence of undisputed facts. More important, as the Seventh Circuit found, evidence of conferencing is not the type of evidence to which Circular One applies. This use of Circular One was just wrong, and the Organization had no reason to anticipate such a use of it. Seventh Circuit properly applied its own case law, specifically *Wells,* where it had found that even a published rule (as to the filing of a brief) should not be applied to keep out the brief when the late submission of the brief had not prejudiced the other side. *Wells,* 498 F.2d at 913.

If the Organization had not submitted the evidence at an earlier stage, it was only because Carrier had failed to object to lack of conferencing. If the NRAB panel allowed the Carrier to make an untimely objection, it should have allowed the Organization to submit the evidence to meet the objection. Indeed, if Circular One applied to evidence of conferencing, the NRAB panel should have barred the untimely objection, because the Carrier should have raised such a "relevant, argumentative" fact when it filed its original submission. *See* 29 C.F.R. §301.5(e). It is at least an element of due process that a party like the Organization should have timely, reasonable prior notice of the charges to which it would have to respond. If lack of conferencing was to be a claim in this case, the Organization was entitled to some prior notice at the time it filed its original submission.

The Organization, not the Carrier, was the party that was unfairly prejudiced. The Seventh Circuit's decision made that clear:

> . . . any blindsiding came from the Carrier's actions. When the Organization filed its Notice of Intent to proceed to arbitration, it forwarded a copy of the on property record to the NRAB, and of course to the Carrier. It was clear from the face of the documents that the on property record to the NRAB lacked any written evidence that a conference had occurred. The Carrier, however, did not object to the lack of evidence of conferencing. Instead, it responded substantively to the merits of the claims and the parties proceeded to arbitration. Only on the eve of arbitration – when the Carrier claims the record was closed to all new submissions – did it raise its objection to the lack of evidence.
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> – Pet.App.21a.

In an analogous situation at the National Labor Relations Board, federal courts have held that parties are entitled to either advance notice of the claim against it or the opportunity to fully litigate the issue when a new claim is made. *NLRB v. Complas Industries Inc.*, 714 F.2d 729, 734 (7th Cir. 1983); *Henry Bierce Co. v. NLRB,* 23 F.3d 1101 (6th Cir. 1994). Here the Organization did not have notice of the conferencing issue or the opportunity to fully litigate it.

The Carrier has argued that based on prior arbitration awards the Organization should have assumed it had to prove conferencing whether or not the Carrier raised an objection. Yet the arbitration awards cited by the Carrier do not make any such point. The Seventh Circuit goes into detail as to why the cited awards are not precedents. The Organization cannot improve on the Seventh Circuit's analysis of these purported precedents. Yes, these awards dismiss cases for lack of conferencing "in the record." JA-40-59. But in these cited awards there is no question that the parties did in fact fail to conference. None of these cases bar a party from presenting any evidence of conferencing. None of them apply Circular One to keep out evidence after an objection is made. None dismiss for lack of conferencing when a party like the Carrier technically avoided claiming that the conferences had failed to occur and where the NRAB panel even acknowledged that such evidence might be persuasive or convincing.

Furthermore, even if the awards cited by the Carrier were on point (and they are not), the arbitration awards of NRAB panels – certainly at this time – were not collected or indexed or even being published in a systematic way. The publication of the awards in bound volumes had stopped in 1972. Only in July 2005 – after these claims had been dismissed – did the National Mediation Board begin partial "online" publication of the awards. Even this new online service has no index or digest. Furthermore, with the exception of one award, the awards cited by the Carrier are not even from the First Division. They come from the Second, Third, and Fourth Divisions outside the jurisdiction of this First Division NRAB panel. These are Divisions to which the particular Organization advocates in this case (who practice only in the First Division) do not have access. Even the single First Division award cited by the Carrier is not at the present moment available online. In short, these awards attached by the Carrier in the Joint Appendix are not only off the point, but would not have been seen by the Organization advocates for these five engineers. The Organization had no fair or reasonable prior notice from these awards or any other legal source that it had to submit evidence of conferencing; the Carrier had not even raised the issue prior to the hearing.

D. Individual NRAB panels cannot engage in "rule making by adjudication."

In voting against *en banc* review, two members of the Seventh Circuit incorrectly stated that even if the NRAB panel had no authority under Circular One, it could have imposed a new rule "by adjudication" and applied it without notice retroactively. A single NRAB panel has no authority to make rules, either by rule-making or adjudication. The RLA gives rule-making authority to the Adjustment Board as a whole – the body which consists of 34 labor and management representatives. The Chairman and Vice Chairman of the Adjustment Board represent management and labor respectively. This is the only body to which Congress entrusted any rule-making authority. *See* 45 U.S.C. §153 First (v). It necessarily operates by consent of both management and labor: there are no "neutrals" or "referees" to create rules in case of a tie. Even in this case, Congress allowed such rule-making authority on a one time only basis, to be completed within 45 days after June 21, 1934. The result of that rule-making, i.e., Circular One, are the only rules that are now part of the Code of Federal Regulations.

A single NRAB panel is a far cry from the Adjustment Board itself. It is only one of several panels operating in the four Divisions of the NRAB. The Organization knows of no "rule" that has ever been created by a single NRAB panel. The individual NRAB panels are not supposed to interpret the RLA as the NLRB or the SEC does with respect to their organic statutes. The panels are not commissioned by Congress to render such interpretations. *Cf. Chevron,* 467 U.S. 837. Rather, they are supposed to interpret and apply the CBA. *See Sheehan,* 439 U.S. at 94 ("The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions."), citing *Price,* 360 U.S. at 611 and *Elgin, J. & E. Railway Co. v. Burley*, 327 U.S. 661, 664 (1946).

Even in the case of the NLRB or SEC, this Court does not favor rule-making by adjudication. *See SEC v. Chenery,* 318 U.S. 80 (1943); *NLRB v. Wyman Gordon,* 394 U.S. 759 (1969). However, at least those agencies operate by some limited use of precedent. In this case "rulemaking by adjudication," by a single NRAB panel, is a conceptual impossibility, because the RLA arbitration process does not operate by strict adherence to *stare decisis*. *See* Jacob A. Seidenberg, *The Railway Labor Act at Fifty, Grievance Adjustment in the Railroad Industry*, 209, 220-221 (National Mediation Board, 1977). The Referee who wrote these decisions may claim he is "bound" by "precedent" (which included one of his own cases) but in fact he is not. Arbitration awards do not have the weight of judicial precedent, and arbitrators are not bound by the rationale of earlier decisions. *See, e.g., Butler Armco Independent Union v. Armco Inc.* 701 F.2d 253, 254 (3d Cir. 1983); *El Dorado Technical Services, Inc. v. Union General De Trabajadores De Puerto Rico,* 961 F.2d 317, 321 (1st Cir. 1992). Indeed, a federal court once held that the very referee in this case, Elliott Goldstein, was not bound by prior arbitration awards. *Wyman-Gordon Co. v. United Steelworkers of America,* 613 F. Supp. 626, 629 (N.D. Ill. 1985). Even NRAB awards state there is no strict adherence to "stare decisis." *See, e.g.,* NRAB Award No. 15719.[3] Even if there were strong *stare decisis*, there is no system or mechanism to allow any single NRAB panel to know what any other panel has decided. That problem is compounded by the existence of four Divisions.

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[3] Available online at the "NMB Knowledge Store," http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

There cannot be rule-making if there cannot be "rules" with any binding or even strong *stare decisis* effect. If no NRAB panel has any authority to bind another panel, it is impossible to engage in rulemaking by adjudication. No single panel has the legal authority to issue "rules" for the entire Adjustment Board.

In a system like the NRAB with very weak *stare decisis*, there is no particular logic for applying an unfair or surprising "interpretation" retroactively – certainly not for the sake of any consistency. Indeed, even in a system with strict *stare decisis*, this Court has cautioned against applying new procedural rules retroactively. *See Landgraf v. USI Film Products,* 511 U.S. 244 (1994). On matters of substantive law, this Court has required retroactive application only to ensure the uniformity appropriate in a judicial system based on precedent. *See, e.g., James Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991) ("These rationales do not apply analogously to agency adjudications."); *Laborers' Int'l Union of North America, AFL-CIO v. Foster Wheeler Energy Corp.,* 26 F.3d 375, 386, fn. 8 (3d Cir. 1994), *District Lodge 64 Int'l Ass'n of Aerospace Workers v. NLRB,* 949 F.2d 441, 447 (D.C. Cir. 1991). Administrative agencies are different because they mix legislative and judicial functions, and such agencies as the NLRB and SEC have weaker principles of *stare decisis*. And if *stare decisis* is weaker even for such agencies as these, it is even weaker for the individual NRAB panels acting independently of each other.

Despite the unfairness in particular cases, *Beam* allows retroactive application of new interpretations in order to serve the goal of consistency in our judicial system. But all the principled considerations that justify the outcome in cases like *Beam* are absent here. Maybe the new interpretation will be applied by another panel. Or maybe it will not. "Retroactivity" in this system can be a one-time *ad hoc* event which only aggravates the unfairness. In short an individual NRAB panel should not be rule-making at all by adjudication at all, and it certainly should not do so retroactively. This Court has made clear its distaste for this practice. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208-09 (1988).

Aside from the singular unfairness of retroactivity, the Organization notes that some NRAB panels do *not* dismiss cases "with prejudice" for lack of conferencing. There is no consistent practice. Some panels simply stay the cases and allow the parties to conference and then return. *See, e.g.,* NRAB Awards 23867, 5074.[4] Dismissal with prejudice is too draconian a penalty even when the parties fail to conference. What is unique about this case is to dismiss for lack of conferencing when conferences occurred. It is no wonder that on the record here, the Seventh Circuit found the due process issue "unavoidable."

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[4] Available online at the "NMB Knowledge Store," http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

III. THE COURT MAY VACATE THESE AWARDS ON THE STATUTORY GROUND THAT THE NRAB PANEL HAD NO AUTHORITY TO DISMISS THESE CASES AND THEREBY FAILED TO "CONFINE OR CONFORM" ITSELF TO ITS PROPER AND LIMITED JURISDICTION UNDER THE RLA.

The Seventh Circuit's finding of a due process violation made it unnecessary for it to decide the statutory claim which Organization argued with equal measure. The case law in the Seventh Circuit and other Circuits is arguably as well developed for due process review as it is for statutory claims. *See Wells,* 498 F.2d 913. While courts should avoid novel constitutional claims, there is nothing "novel" about this form of review. In rare and limited instances, this form of review goes back decades.

Nonetheless, the Organization contends that if due process review is not available for any reason, the Seventh Circuit should be allowed to consider the statutory ground, namely, that the NRAB panel exceeded its jurisdiction – or failed to "confine or conform" to its proper jurisdiction, to use the language of 45 U.S.C. §153 First (q). Since the

Seventh Circuit found that the NRAB panel acted without legal authority under Circular One, such a finding establishes a violation on this statutory ground as well. Specifically, by barring evidence of conferencing without any legal basis, this individual NRAB panel went far beyond its limited role of deciding these contractual claims in the CBA.

Yet there is a good reason why the Seventh Circuit chose to find a violation of due process. First, the wrong here is entirely procedural in nature, and due process is a more effective way of conceptualizing and redressing a wrong that is procedural only. Second, due process allowed the Seventh Circuit to consider whether an action by the NRAB in excess of its jurisdiction also results in a denial of a fundamentally fair hearing. To the extent that the NRAB's action went beyond the law *and* resulted in a denial of a process for fair resolution of the contractual claims, the finding of a due process violation strengthens the case for judicial intervention, which should always be extremely rare. Pet.App.21a-22a. Both on statutory and due process grounds, these orders of dismissal should be vacated. The five engineers deserve resolution of their contractual claims.

◆

CONCLUSION

The Organization respectfully submits the decision of the Seventh Circuit should be affirmed.

Respectfully submitted,

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Counsel for Respondent

AGREEMENT BETWEEN UNION PACIFIC RAILROAD (UP) AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS (BLE)

Whereas the BLE and various Carriers represented by the National Railway Labor Conference (NRLC) (including UP) have entered into a tentative agreement;

Whereas the aforementioned tentative agreement is presently subject to ratification by the BLE before it can become effective;

Whereas the BLE and UP have also reached certain other tentative agreements, listed below and attached hereto;

Whereas it is the intention of the parties that such other agreements, listed below and attached hereto, only become effective if and when the agreement between the BLE and those Carriers represented by the NRLC is ratified and becomes effective;

It is agreed:

1. The BLE and UP have reached tentative agreement on the following agreements, copies of which are attached hereto:
    - (a) System Agreement – Discipline Rule
    - (b) System Agreement – Claim Handling Process
    - (c) System Agreement – Instructor Engineers
    - (d) System Agreement – Peer Training

(e) System Agreement – Weight on Drivers

(f) System Agreement – Extra (Undisturbed) Rest

(g) System Agreement – Without Fireman Payment

(h) System Agreement – Compensation Delivery

2. The above-listed agreements will become effective only if and when the agreement between the BLE and the various Carriers represented by the NRLC is ratified and becomes effective. In that event, the above listed agreements will become effective on the same date as the BLE/NRLC Agreement.

Signed this 21 day of March, 1996

/s/ B. D. MacArthur
B. D. MacArthur – BLE

/s/ [Illegible]
L. A. Lambert – UP

/s/ D. E. Penning
D. E. Penning – BLE

/s/ A. Terry Olin
A. T. Olin – UP

/s/ M. L. Royal Jr.
M. L. Royal, Jr. – BLE

/s/ Jan Raaz
J. M. Raaz – UP

/s/ D. L. Stewart
D. L. Stewart – BLE

Approved:

/s/ [Illegible] Young
M. A. Young – BLE

/s/ [Illegible]
J. J. Marchant – Sr.
AVP – UPRR

Approved:

/s/ R. E. Dean
R. Dean – VP – BLE

Attachment (a)

SYSTEM AGREEMENT – DISCIPLINE RULE

1. All existing agreements pertaining to the handling of discipline are eliminated and replaced by this agreement.

GENERAL

2. Locomotive engineers will not be disciplined without first being given a fair and impartial investigation except as provided below. They may, however, be held out of service pending investigation, but it is not intended that an engineer be held out of service for minor offenses.

NOTICE

3. Within 10 days of the time the appropriate company officer knew or should have known of an alleged offense, the engineer will be given written notice of the specific charges against him or her. The notice will state the time and place of the investigation and will be furnished sufficiently in advance to allow the engineer the opportunity to arrange for representation by a BLE representative(s) (the BLE Local Chairman or other elected BLE Officers) and witnesses. The

notice will propose discipline to be assessed if investigation is waived and designate a carrier officer who may be contacted for the purpose of arranging for an informal conference on the matter. A copy of the notice will be furnished to the BLE Local Chairman.

WAIVER

4. Prior to the investigation, the engineer (and the BLE representative if desired by the engineer) may contact the designated carrier officer and arrange for an informal conference to discuss the alleged offense and proposed discipline. Such informal conference may be either in person or by telephone.

   (a) If such informal conference results in the proposed discipline being dropped, no further action will be taken.

   (b) If such informal conference results in proposed discipline being accepted by the engineer and the investigation being waived, the engineer's record will be updated accordingly.

   (c) If such informal conference does not result in either (a) or (b) above or no informal conference takes place, the discipline imposed as a result of a hearing may not exceed that proposed in the notice of charges.

INVESTIGATION

5. Unless postponed for good cause, the investigation will be held no later than 10 days after the date of the notice.

6. When practicable, the investigation will be held at the engineer's home terminal. When that is not practicable, the investigation will be held at a location which will minimize the travel, inconvenience and loss of time for all employees, involved. When an engineer is required to travel to an investigation at other than his or her home terminal, the engineer will be reimbursed for actual, reasonable and necessary expenses incurred.

7. Where request is made sufficiently in advance and it is practicable, the engineer and/or the BLE representative will be allowed to examine material or exhibits to be presented in evidence prior to the investigation. At the investigation, the engineer and/or the BLE representative will be afforded the opportunity to examine or cross examine all witnesses. Such examination will extend to all matters under investigation.

8. The investigation will be recorded and transcribed. Copies of transcript will be furnished to the engineer and the BLE Local Chairman no later than the date discipline is issued. If the accuracy of the transcript is questioned and the investigation was electronically recorded, the tapes shall be examined and, if necessary, the transcript will be corrected.

DECISION

9. A written decision will be issued no later than 10 days after completion of the hearing. The notice will be sent by US Mail to the last known address of the engineer and to the BLE Local Chairman.

10. If the Superintendent fails to issue a decision within such 10 day time limit or if the engineer is found not at fault, the engineer will be paid for any time lost and the engineer's record will be cleared of the discipline at issue.

APPEALS

11. If the engineer is not satisfied with the decision, the BLE General Chairman, may appeal to the designated Labor Relations officer within 60 days from the date of the Superintendent's decision.

12. The Labor Relations officer will respond to the appeal within 60 days from the date of the BLE General Chairman's appeal. If the Labor Relations officer fails to respond within 60 days, the engineer will be paid for any time lost and the engineer's record will be cleared of the discipline at issue.

13. If the engineer is dissatisfied with the decision of Labor Relations, proceedings for final disposition of the case under the Railway Labor Act must be instituted by the engineer or his other duly authorized representative within one year of the date of that decision or the case will be considered closed and the discipline will stand as issued, unless the time limit is extended by mutual agreement.

MISCELLANEOUS

14. If a dispute arises concerning the timeliness of a notice or decision, the postmark on the envelope containing such document shall be deemed to be the date of such notice or decision.

15. Engineers attending an investigation as witnesses at the direction of the carrier will be compensated for all time lost and, in addition, will be reimbursed for actual, reasonable and necessary expenses incurred. When no time is lost, witnesses will be paid for actual time attending the investigation with a minimum of two hours, to be paid at the rate of the last service performed.

16. The engineer being investigated or the BLE representative may request the Carrier to direct a witness to attend an investigation, provided sufficient advance notice is given as well as a description of the testimony the witness would be expected to provide. If the Carrier declines to call the witness and the witness attends at the request of the engineer or BLE and provides relevant testimony which would not otherwise have been in the record, the carrier will compensate the witness as if it had directed the witness to attend.

17. If, by operation of this agreement or as the result of an arbitration decision, the Carrier is required to pay an engineer who has been disciplined for "time lost", the amount due shall be based on the average daily earnings of the engineer for the 12 month period (beginning with the first full month) prior to removal from service. The sum of

the claimant's earnings during such period shall be divided by 365 to arrive at the average daily earnings to be applied in determining the amount of lost wages, based on the number of days of discipline.

NOTE, Section 1: This agreement is not intended to modify or replace "By-Pass" or "Companion" Agreements.

This agreement is not intended to modify or replace Carrier policies pertaining to discipline; except that to the extent this agreement may conflict with a Carrier policy, this agreement shall govern.

NOTE, Section 17: The twelve (12) month period utilized in determining the employee's average daily earnings will not include any month(s) in which the employee experienced unusually low earnings due to circumstances beyond his/her control, such as personal injury, documented major illness, of the employee or a family member, etc. It is not the intent of this NOTE, however, to exclude those months in which the employee lays off on his/her own accord. It is intended the twelve (12) month period utilized will reflect the engineer's normal work habits and history.

Example: An engineer was dismissed in October for an alleged rules violation. Pursuant to an arbitration award, the engineer is reinstated and awarded time lost (back pay). Six months prior to his/her dismissal, said engineer was off-duty (medical leave) for two (2) months (March and April) due to a documented major illness, such as a heart attack.

> Calculation of the employee's average daily earnings for the preceding twelve (12) months will commence with September and will incorporate the prior fourteen (14) months, including September (March and April are excluded due to the employee having no earnings in those months due to the medical condition).

*   *   *

REPLY
BRIEF

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

10

No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
PETITIONER,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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347

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE THREE STATUTORY GROUNDS ARE EXCLUSIVE 1

  A. The Statute Is Clear 1

  B. Respondent Misunderstands The Objectives And Legislative History Of The 1966 Amendments 3

  C. The Statute Authorizes Review Of Procedural Violations Of The RLA 6

  D. Respecting Congress's Clear Directive Does Not Violate The Constitution 8

II. THE BOARD'S DECISION DID NOT VIOLATE DUE PROCESS 10

  A. Respondent's Claims Of Surprise Or Unfairness Are Unfounded 11

  B. The First Division's Decision Did Not Violate Due Process 20

III. THE ONLY TRIBUNAL THAT EXCEEDED ITS JURISDICTION HERE WAS THE SEVENTH CIRCUIT 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

14 Penn Plaza LLC v. Pyett,
129 S. Ct. 1456 (2009) 6

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 3

Bowen v Georgetown University Hospital,
488 U.S. 204 (1988) 22, 23

Bush v. Lucas,
462 U.S. 367 (1983) 5

Califano v. Sanders,
430 U.S. 99 (1977) 3

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 25

Elgin, Joliet & Eastern Railway Co. v. Burley,
327 U.S. 661 (1946) 14

Elmore v. Chicago & Illinois Midland Railway Co.,
782 F.2d 94 (7th Cir. 1986) 8

Finley Lines Joint Protective Board Unit 200 v. Norfolk Southern Railway Co.,
312 F.3d 943 (8th Cir. 2002) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Gunther v. San Diego & Arizona Eastern Railway Co.,
382 U.S. 257 (1965) 5

Hall Street Associates, L.L.C. v. Mattel, Inc.,
128 S. Ct. 1396 (2008) 5

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 10

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 10

Harper v. Virginia Department of Taxation,
509 U.S. 86 (1993) 22

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994) 15

Henry Bierce Co. v. NLRB,
23 F.3d 1101 (6th Cir. 1994) 19

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 26, 27

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 24

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 25, 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Jones v. St. Louis-San Francisco Railway Co.,
728 F.2d 257 (6th Cir. 1984) 7

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362 F.3d 658 (10th Cir. 2004) 7

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520 F.2d 570 (7th Cir.), *cert. denied*, 423 U.S.
1016 (1975) 29

Kuhn v. Fairmont Coal Co.,
215 U.S. 349 (1910) 22

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 22

Mathews v. Eldridge,
424 U.S. 319 (1976) 9

Mitchell v. Forsyth,
472 U.S. 511 (1985) 24

NLRB v. Complas Industries, Inc.,
714 F.2d 729 (7th Cir. 1983) 19

Norfolk & Western Railway Co. v.
Transportation Communications
International Union,
17 F.3d 696 (4th Cir. 1994) 28

TABLE OF AUTHORITIES—Continued

Page(s)

Order of Railway Conductors of America v. Swan,
329 U.S. 520 (1947) 15

Pennsylvania Railroad Co. v. Day,
360 U.S. 548 (1959) 15

Pocket Veto Case,
279 U.S. 655 (1929) 2

Radin v. United States,
699 F.2d 681 (4th Cir. 1983) 4, 7

Schweiker v. Chilicky,
487 U.S. 412 (1988) 5

Schweiker v. McClure,
456 U.S. 188 (1982) 10

Slocum v. Delaware, Lackawanna & Western Railroad Co.,
339 U.S. 239 (1950) 14

Tennessee Secondary School Athletic Association v. Brentwood Academy,
551 U.S. 291 (2007) 9

Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks,
281 U.S. 548 (1930) 27

TABLE OF AUTHORITIES—Continued

Page(s)

TRW Inc. v. Andrews,
534 U.S. 19 (2001) 2

Union Pacific Railroad Co. v. Price,
360 U.S. 601 (1959) 4, 6

Union Pacific Railroad Co. v. Sheehan,
439 U.S. 89 (1978) 1, 3, 20, 27

United Paperworkers International Union v. Misco, Inc.,
484 U.S. 29 (1987) 27

United Steelworkers of America v. Enterprise Wheel & Car Corp.,
363 U.S. 593 (1960) 7

United States v. Fausto,
484 U.S. 439 (1988) 5

Utah v. Evans,
536 U.S. 452 (2002) (Resp.Br.26) 2, 4

Webster v. Doe,
486 U.S. 592 (1988) 3

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

U.S. Const. art. I, §7, cl. 4 2

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. §2254(d)(1) 10

45 U.S.C. §151a(4) 27

45 U.S.C. §151a(5) 27

45 U.S.C. §153 First (q) 2, 21, 24, 27

29 C.F.R. §301.2(a) 11

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TABLE OF AUTHORITIES—Continued

Page(s)

ADMINISTRATIVE MATERIAL

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National Railroad Adjustment Board Uniform Rule of Procedure 1(a)-(b) (revised June 23, 2003) 17

National Railroad Adjustment Board Uniform Rule of Procedure 5 (revised May 4, 1994) 17

National Railroad Adjustment Board Uniform Rule of Procedure 8 (adopted Oct. 27, 1987) 17

ARGUMENT

The RLA limits judicial review of NRAB decisions to three exclusive statutory grounds that this Court has characterized as "among the narrowest known to the law," in order to protect the crucial national interest in the speedy and final resolution of labor disputes in the rail and airline industries. Respondent's brief offers no persuasive reason for disregarding the plain language of the statute. Its constitutional analysis confuses the ordinary retroactivity inherent in all adjudication with a due process problem. And its alternative statutory argument is inconsistent with the text of Circular One and the standards that this Court has articulated in every other context for judicial review of procedural issues arising in arbitration. The Seventh Circuit's decision should be reversed.

I. THE THREE STATUTORY GROUNDS ARE EXCLUSIVE

A. The Statute Is Clear

The RLA expressly limits judicial review of NRAB orders to three specific grounds, and "due process" is not one of them. In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 93 (1978), this Court found the Act's plain language "unequivocal[]" and "emphasized that this statutory language means just what it says." Respondent pretends that the statutory argument against "due process" review depends on the *expressio unius* canon or similar inferences from congressional silence. Resp.Br.28. Union Pacific specifically *did not* rely on "debatable *inferences*" but on "the plain and express meaning of the text." Pet.Br.26.

Respondent asserts (at 27-28) that "[t]here is not a word in subparagraph (q) that review under it is 'exclusive,'" and suggests that the following sentence contains "words without limitation": "The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct." 45 U.S.C. §153 First (q). But the very next sentence states that "the findings and order of the division *shall be conclusive* on the parties, *except that*" review may be had on three identified grounds. *Id.* (emphasis added).

"Conclusive" means "decisive"; "final"; and "that settles a question." *Webster's New World Dictionary: Second College Edition* 295 (1989); *see also Black's Law Dictionary* 329 (9th ed. 2009) ("[a]uthoritative" and "decisive," as in "her conclusive argument ended the debate"). And "except" plainly denotes an exclusive category of exceptions to the generally "conclusive" nature of these awards. *See, e.g., Merriam-Webster Dictionary* 403 (10th ed. 2001) ("except" means "only"). When the Constitution says that the President's opportunity to veto a bill runs for ten days—"Sundays excepted"—it means that *only* Sundays are excluded. U.S. Const. art. I, §7, cl. 4; *Pocket Veto Case*, 279 U.S. 655, 675, 691-92 (1929). "'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citation omitted).

This case is nothing like *Utah v. Evans*, 536 U.S. 452 (2002) (Resp.Br.26), where this Court rejected the argument that merely "by directly authorizing" certain lawsuits a statute "implicitly forbids" others. 536 U.S. at 462-63. This Court explained in *Sheehan* that "[the

RLA] unequivocally states that ... [Board decisions] may be set aside *only* for the three reasons specified therein." 439 U.S. at 92-93 (emphasis added). Respondent (at 17) invokes cases like *Webster v. Doe*, 486 U.S. 592, 603 (1988), and *Califano v. Sanders*, 430 U.S. 99, 109 (1977), but does not seriously engage UP's explanation of why those cases are inapposite. *E.g.*, Pet.Br. 25-32. Respondent seems to think that limitation of judicial review requires magic words, but this Court has consistently rejected that position. *E.g.*, *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984).

Respondent even concedes that some due process challenges are precluded under the RLA. Resp.Br.33. It reads *Sheehan* as holding that "once an arbitrator applies the CBA, there is no due process review of that application" because "the interpretation of the CBA itself could be reviewed only on one of the three statutory grounds." Resp.Br.34. Nothing in *Sheehan* suggests that some non-statutory review grounds are permitted while others are not.

B. Respondent Misunderstands The Objectives And Legislative History Of The 1966 Amendments

Respondent states (without citation) that in 1966 "Congress sought to expand—not limit—the existing direct judicial review of NRAB awards." Resp.Br.25. UP's opening brief detailed the extensive legislative history demonstrating that Congress's purpose in 1966 was to strengthen the finality of Board awards while providing for symmetrical, but highly limited, judicial review. Pet.Br.20-23.

Respondent's only answer is that prior to 1966 some lower courts permitted "due process" challenges, this Court had acknowledged the existence of those decisions in *Union Pacific Railroad Co. v. Price*, 360 U.S. 601 (1959), and no one in Congress said anything about them either way in 1966. Respondent's inference from congressional silence is not persuasive.

First, the language it points to in *Price* is clearly dicta. This Court certainly had never "'exercised'" or "claimed" the authority to set aside Board awards on due process grounds, as Respondent incorrectly suggests. Resp.Br.26 (quoting *Evans*, 536 U.S. at 463), 21; *see also id.* at 17.

Second, as Respondent acknowledges (at 23), those pre-1966 decisions were rendered "at a time when federal law did not provide for statutory review" for disappointed employees *at all*. That inequity clearly motivated some lower courts to bend the "final and binding" language in the 1934 statute to permit collateral attacks under various equitable causes of action. The 1966 amendments transformed the landscape by explicitly authorizing judicial review of certain procedural deficiencies in Board proceedings, eliminating any plausible argument that extra-statutory "due process" review was necessary or consistent with the statutory scheme. As the Fourth Circuit explained in *Radin v. United States*, 699 F.2d 681, 687 n.14 (4th Cir. 1983), the early cases permitting due process challenges under various equitable causes of action "arose before the 1966 amendments in §153 First (q) that provide for full and direct judicial review of NRAB, and are no longer persuasive."

This Court has recognized that comprehensive statutory review schemes generally displace generic equitable causes of action of the sort relied upon by the lower courts to engage in "due process" review prior to 1966. In *United States v. Fausto*, this Court held that the judicial review provisions of the Civil Service Reform Act foreclosed "the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, injunction, and declaratory judgment." 484 U.S. 439, 444 (1988) (citations omitted). Congress had enacted an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various ... employees with the needs of sound and efficient administration." *Id.* at 445. This Court has applied similar principles when refusing to imply extra-statutory remedies for constitutional claims. *See Bush v. Lucas*, 462 U.S. 367, 368 (1983) (refusing to imply a *Bivens* remedy for federal employees, in light of statute's "comprehensive procedural and substantive provisions giving meaningful remedies against the United States").[1] The RLA similarly establishes a "'mandatory, exclusive, and comprehensive system for resolving grievance disputes,'" *Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 263-64 (1965) (citation omitted), including particular grounds for judicial review.

Congress struck a careful balance in 1966 between additional procedural safeguards and the overarching importance of speedy resolutions of grievances. This Court has repeatedly recognized the importance of finality in arbitration and emphasized the judiciary's limited role in reviewing such disputes. *See, e.g.*, *Hall*

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[1] *Bush* (and similar prior cases such as *Schweiker v. Chilicky*, 487 U.S. 412 (1988)), do not conclusively resolve this case because the statutes provided for judicial review of constitutional claims at the end of the administrative process. Nonetheless, much of this Court's reasoning remains pertinent.

St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008) (more expansive judicial review would "bring arbitration theory to grief in post-arbitration process"); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 (2009) (noting the Court's "'strong endorsement of the federal statutes favoring this method of resolving disputes'") (citation omitted). Creative lawyers can reframe almost any procedural complaint about the arbitration in due process terms, particularly when armed with the remarkable due process theory embraced by the Seventh Circuit here. A ground for review so expansive and manipulable would fundamentally undermine the policies of finality and limited judicial review which underlie the RLA (and arbitration generally). *See, e.g., Price*, 360 U.S. at 616 (RLA "was designed for effective and final decision of grievances which arise daily").

C. The Statute Authorizes Review Of Procedural Violations Of The RLA

Respondent argues that the three statutory grounds permit a court to review "a panel's interpretation of a CBA" but do not permit any review of *procedural* deficiencies in Board proceedings. Resp.Br.29-31. Respondent suggests that extra-statutory due process review is therefore essential to ensure that the Board complies with the RLA's most basic procedural safeguards. *See* Resp.Br.36 ("[D]ue process review ensures that NRAB panels conduct hearings under the RLA.").

Respondent essentially gives the statutory review criteria an implausibly narrow construction in order to manufacture a problem that must then be "solved" by inventing extra-statutory review grounds. The RLA specifically permits review of violations of the Act itself, even if they are procedural in nature. In *Radin*, for example, the Fourth Circuit explained that "the Act specifically provides that NRAB awards can be set aside for the procedural irregularities [that the employee] complains of in this case." 699 F.2d at 687; *see also id.* at 684 ("[The NRAB] allegedly denied him statutorily mandated due process rights in sustaining his dismissal, and such procedural deprivation by the arbitrators is ground for relief in the district court."); *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 662 n.3 (10th Cir. 2004) ("[T]he Railway Labor Act itself provides for sufficient procedural due process within its own boundaries."); *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 261-62 (6th Cir. 1984) (recasting due process claim as one for "fail[ure] to comply with the requirements of the [RLA]"). Respondent argues that the statutory review criteria embrace its procedural complaints in this case, Resp.Br.52-53, and has previously argued that those criteria are coextensive with the Due Process Clause, *see* Pet.Br.36 & n.9 (collecting such assertions).

Respondent's suggestion that the statutory criteria were primarily designed to permit review of a panel's substantive "interpretation of a CBA" is implausible. The statutory grounds principally relate to *procedural* flaws with the arbitration, not to the substantive interpretation of the parties' agreement. Respondent emphasizes the possibility of judicial review on the ground that the award completely failed to "draw[] its essence from the collective bargaining agreement" and instead reflected the Board's "own brand of industrial justice." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); Resp.Br.31. An award of that nature might be reviewable on the statutory ground that the Board failed to respect the limits of its jurisdiction. But the availability of limited merits review in rare and extreme cases certainly does not establish that the Board's interpretation of the CBA is the exclusive basis for review under §153 First (q).

D. Respecting Congress's Clear Directive Does Not Violate The Constitution

This Court has explained that whether Congress could foreclose all judicial review of a colorable constitutional claim presents a serious constitutional question.[2] That may be a serious question, but it does not have to be a yes-or-no question. The importance of judicial review can be approached as a due process issue, or as a question arising under the particular constitutional provision creating the rights at stake. Of course here those approaches converge. However framed, the analysis should be sensitive to the particular context, the type of claim for which review is not afforded, the strength of Congress's reasons, and the availability of alternative safeguards.

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[2] *Amicus* AFL-CIO suggests that the Board is so similar to private arbitrators that its awards may not even be state action. The NRAB is "public in name and function." *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986). NRAB neutrals are paid by the federal government. The lower courts have concluded for decades that the Board's awards are state action, and there is no reason for this Court to revisit that issue in a case where neither party has ever contested it. But the AFL-CIO's argument underlines the basic point that any constitutional interests at stake here, and not adequately protected by the statutory review grounds, are exceedingly weak and attenuated. Pet.Br.32-39.

The only question presented here is whether Congress can limit review of *procedural due process* claims to a statutory framework that internally guarantees all the process that this Court has ever suggested might be due, for the purpose of producing swift and binding arbitral resolutions of employment grievances in an industry crucial to broad national interests.[3] The procedures guaranteed by the RLA are without question constitutionally sufficient on their face, Pet.Br.34-35, and Respondent simply complains that the Board misapplied a procedural rule to the facts of these cases. Due process does not demand judicial review at that level of specificity, particularly in an arbitral context. To the contrary, procedural due process has always focused on "the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). If Congress *cannot* channel due process scrutiny through the clear and objective statutory requirements, then (as this case demonstrates) these grievances may be prolonged for many years. This Court has recognized that not every litigation context needs to be a vehicle for adjudicating novel claims at the outer boundaries of constitutional law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); 28 U.S.C. §2254(d)(1).

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[3] There is no reason for this Court to opine on whether the RLA precludes *other* constitutional claims. The issue may never arise. The statutory review grounds embrace almost any plausible equal protection claim, Pet.Br.35, and the NRAB's substantive decisions just enforce the parties' consensual collective bargaining agreement, which is unlikely to raise any issues of constitutional stature. *See, e.g.*, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 295-300 (2007) (recruiting rules agreed to by voluntary participants in athletic league do not violate First Amendment).

The balancing test established by *Mathews* affords a sound framework for evaluating whether judicial review of a procedural due process claim is essential in this context. This Court has invoked the *Mathews* framework when considering the importance of independent review of executive action when far weightier constitutional interests were at stake. *E.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) (plurality op.). And the balance Congress struck here is plainly reasonable. The statutory scheme provides everything reasonably necessary to ensure that the arbitral process is fundamentally fair. The statutory criteria also permit review of all of the due process claims that are common and likely to be meritorious. Pet.Br.37. Non-statutory judicial review therefore would not seriously "reduce the risk of erroneous deprivation." *Schweiker v. McClure*, 456 U.S. 188, 199-200 (1982) (citation omitted). And the potential harm to other interests such as the speedy, efficient, and final resolution of disputes is quite severe.

II. THE BOARD'S DECISION DID NOT VIOLATE DUE PROCESS

UP's opening brief explained that the Seventh Circuit's due process reasoning committed two distinct but related errors. First, there was no unfair surprise because the language of the statute, regulations, and prior Board decisions made the decision here at least foreseeable, and in fact likely. Second, even if this were the first time the Board had ever confronted this issue (and clearly it was not), there is no due process problem with the application of general rules to particular facts—even in novel and debatable circumstances. That is the nature of adjudication.

Respondent essentially argues that the Board should have interpreted the general rules in Circular One differently on these facts, that the extensive body of precedent built up by the Board over decades must be wholly ignored, and that arbitral panels lack any authority to interpret and apply the RLA, Circular One, and the NRAB's other procedural rules in circumstances where the application of those rules is in any way debatable. Respondent paints a misleading picture of NRAB proceedings, and its peculiar vision of due process would leave the Board unable to function.

A. Respondent's Claims Of Surprise Or Unfairness Are Unfounded

BLET's factual premises are incorrect. The Board's ruling was foreseeable and the procedures followed here were fundamentally fair. *See* Pet.Br.40-47.

First, Circular One mandates that "[n]o petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act." 29 C.F.R. §301.2(b). That provision plainly indicates that the Board must be satisfied that the RLA's preconditions, including conferencing, have occurred before it "consider[s]" any petition—*i.e.*, that conferencing is a *jurisdictional* requirement. Circular One also requires that disputes must be submitted "with a full statement of the facts and all supporting data bearing upon the disputes," 29 C.F.R. §301.2(a), and that parties "should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth," 29 C.F.R. §301.6.[4] Given the unambiguous requirement of §301.2(b), whether a conference occurred is clearly a fact "bearing on the dispute." And Respondent has no answer to the venerable judicial precedent holding that an appellate court's jurisdiction must be evident from the record submitted to it. Pet.Br.41-42.

Respondent argues that evidence of conferencing is not an "argumentative fact[]" and that it would make no sense to require proof that such evidence was "presented to the carrier," as required by 29 C.F.R. §301.5. That argument proves too much and is unpersuasive even as an interpretation of §301.5. Regardless, it ignores the *Board*'s strong interest, reflected in §§301.2 and 301.6, in obtaining evidence of conferencing to confirm its own jurisdiction.

Second, the Board precedent on this point is both pertinent and clear. Respondent (like the Seventh Circuit) wrongly suggests that the prior arbitral decisions can be distinguished on the ground that in those cases "there [was] no question that the parties did in fact fail to conference." Resp.Br.46. Several of the awards cited by the Board dismissed grievances because evidence of conferencing did not appear *in the record,* which indicates that the arbitrators saw no need to inquire into whether conferencing actually occurred. For example, First Division Award, No. 18679 (Apr. 8, 1958), noted only that "[i]n a review of this record we fail to find any evidence that [a] conference was ever held on the property," JA40, while Third Division Award, No. 30821 (Apr. 27, 1995) indicated only that "[n]owhere does the record indicate that a conference was ever held or requested on the property," JA58. Respondent concedes that "these awards dismiss cases for lack of conferencing 'in the record.'" Resp.Br.46. That is precisely the basis for the Board's dismissal here. *See, e.g.*, Pet.App.68a.[5]

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[4] Respondent quibbles with UP's citation to the statute rather than Circular One, arguing that the Board relied on Circular One. Resp.Br.40. UP's brief cited to the statute and the identical text in Circular One in parallel. Pet.Br.40. Regardless, the Board's decision was not based solely on Circular One, but on "Circular 1" and "the weight of arbitral precedent on this very issue." Pet.App.70a-71a.

One of the awards cited by the First Division in these cases—No. 23883—is directly on point. As here, the union failed to include evidence of conferencing in the record, but later proffered such evidence "in the form of the handwritten notes" of a phone call. Just as here, the Board refused to consider this proof, noting that "[s]ince this statement was not shown to have been furnished to the Carrier on the property, it is not properly before this Board ...." First Division Award, No. 23883 (July 28, 1988).[6]

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[5] This has been the Board's practice for decades. In addition to the cases cited in UP's brief, Pet.Br.42, see First Division Award, No. 23883 (July 28, 1988); Third Division Award, No. 17166 (May 20, 1969); Third Division Award, No. 15400 (Mar. 10, 1967); Third Division Award, No. 19709 (Apr. 13, 1973); Third Division Award, No. 29231 (May 18, 1992); Fourth Division Award, No. 4799 (Oct. 17, 1991). National Mediation Board, *NMB Knowledge Store, available at* http://kas.cuadra.com/starweb1/nmbks/servlet.starweb1?path=nmbks/nmb.web.

[6] The other awards cited by Respondent do not establish any consistent contrary practice. In First Division Award, No. 23867 (Apr. 7, 1988), the panel did suggest in dictum the possibility of

BLET also misrepresents the nature and availability of Board precedent. Prior awards do not have *stare decisis* effect in the judicial sense, but they are viewed by other arbitrators (and even this Court) as persuasive authority and "provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." *Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 243 (1950); Pet.Br.43-46. Congress created the Board as an expert tribunal "acquainted with established procedures, customs and usages in the railway labor world." *Elgin, Joliet & E. Ry. Co. v. Burley*, 327 U.S. 661, 664 (1946). Labor arbitrators take prior arbitral precedent seriously because doing so is the only way to create stability in the interpretation and administration of collective bargaining agreements. *See, e.g.*, Alan Miles Ruben, ed., *Elkouri & Elkouri: How Arbitration Works* 578 (6th ed. 2003) (observing that where arbitral awards are not consistent "the collective bargain made for employees in the unit [will] break down and be replaced, in effect, by a series of individual bargains") (citation omitted); William H. Spencer, *The National Railroad Adjustment Board* 65 (1938) (NRAB "is beginning to lay down precedents which will eventually result in greater uniformity in the interpretation and application of the standard rules of railway collective agreements."); Lloyd K. Garrison, *The National*

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dismissing without prejudice due to the conferencing issue, but ultimately dismissed anyway on laches grounds. In Fourth Division Award, No. 5074 (June 21, 2001), the panel made an equitable exception to the general rule on the ground that the union actually sought to conference but the carrier failed to accommodate its requests.

Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L.J. 567, 593 (1937) (describing the NRAB as a "quasi-judicial tribunal developing its own common law" to bring about "uniform interpretation[s]"). Even this Court looks to Board awards as an important and persuasive interpretive aid. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 254-55 (1994); *Pa. R.R. Co. v. Day*, 360 U.S. 548, 552 & n.2 (1959); *Order of Ry. Conductors of Am. v. Swan*, 329 U.S. 520, 527 (1947).

Respondent's suggestion that prior awards are unavailable to regular participants before the Board is incorrect. The parties to NRAB arbitrations are repeat players; in the absence of formal reporting, carriers and unions maintain their own databases of awards. Respondent's own bylaws establish an "Arbitration Department" in its "National Division," which is charged (*inter alia*) with "manag[ing] the ND electronic arbitration data base." BLET Bylaws §7(i), *available at* http://www.ble659.com/bylaws.pdf. The United Transportation Union maintains a "searchable database of thousands of arbitration awards" on its web site. *See* United Transportation Union, *Awards/Agreement/Other Documents, available at* http://www.utu.org/worksite/awards.cfm. The Brotherhood of Maintenance of Way Employes has its "own database, automated submission preparation, and research tools." Society of Professionals in Dispute Resolution, *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads* 85 (1990).

The partisan members of the divisions, the neutral referees, and the representatives who regularly advocate before the Board are a small community of experts familiar with Board practices, rules, and the large body of NRAB precedent. Parties regularly cite to prior awards, and the Board in this case noted that it had "closely studied the arbitral and judicial precedent cited by *both parties* in support of their respective positions." Pet.App 68a (emphasis added). Indeed, throughout this litigation BLET has claimed in one breath that prior awards are unavailable or have no precedential value, while then appealing to Board precedent it deems useful. *See, e.g.*, Resp.Br.51; Pl.-Appellant Br. (Seventh Circuit) at 26 n.1. It also bears mention that one of the principal First Division awards on which UP has relied in this litigation, First Division Award, No. 18679 (Apr. 8, 1958) (JA40-41), was rendered at a time when Respondent concedes the awards were collected and published in bound volumes. *See* Resp.Br.46.

Third, Respondent erroneously suggests that UP was obliged to raise the conferencing issue at an earlier point in the proceedings, and that UP's failure to do so somehow prejudiced Respondent. *See, e.g.*, Resp.Br. 44-45. Circular One provides that each party is responsible for the contents of its own submissions, and there is nothing unusual or surprising about a ruling that the party invoking an appellate body's jurisdiction must establish it, *see, e.g.*, Fed. R. App. P. 28(a)(4); S. Ct. R. 24.1(e), or that jurisdictional defects may be raised at any time. The Board reasonably put the burden on Respondent to establish that conferences happened. And in these cases the defect was ultimately identified by one of the members of the Board itself. Pet.App.4a. So Respondent's position is, essentially, that the Board cannot raise jurisdictional problems *sua sponte*.

Respondent's suggestion is also difficult to understand as a matter of Board procedure. Typically the union "attach[es] as part of its Submission to th[e] Board a copy of a letter sent to Carrier confirming the fact that a conference was held on the property or a letter from the Carrier referring to the fact that a conference was held on the property." First Division Award, No. 23883 (July 28, 1988). As *amicus* AFL-CIO concedes (Amicus.Br. 12), the parties' submissions are exchanged *simultaneously*. *See* National Railroad Adjustment Board Uniform Rule of Procedure 1(a)-(b) (revised June 23, 2003).[7] Because of this briefing schedule, "the carrier has had to frame and file its submission without having seen the union's submission." *Garrison, supra*, at 578. Revisions to the Board's Uniform Rules of Procedure have steadily eliminated opportunities for post-submission filings, so it is far from clear that UP even had a procedural opportunity to point out the defect in Respondents' submission until the hearing itself. *See* National Railroad Adjustment Board Uniform Rule of Procedure 8 (adopted Oct. 27, 1987) (eliminating rebuttals); National Railroad Adjustment Board Uniform Rule of Procedure 5 (revised May 4, 1994) (eliminating letters of objection). And even if UP *had* somehow anticipated this issue in its initial submission, the Board would have looked to Respondent's (simultaneous) initial submission for the necessary proof and it would still have been missing. Pet.Br.47.[8]

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[7] *Available at* http://www.nmb.gov/arbitration/nrab-rules.pdf.

[8] *Amicus* AFL-CIO points to an instruction sheet promulgated by the NRAB permitting parties participating in the NRAB's

Respondent continues to insist that conferences actually occurred. That issue is legally irrelevant because the Board properly dismissed on the ground that no evidence of conferencing appears in the on-property record. If the actual facts were relevant in some way, in the present posture Respondent's allegation that it "did in fact conference the claims," Petition to Review ¶13, must be taken as true because the district court dismissed under Rule 12(b)(6). UP believes that two of these cases were conferenced but has consistently maintained that the evidence Respondent offers concerning the other three is unpersuasive.

Fourth, BLET's argument that it was deprived of due process because it never had an opportunity to be heard on the merits of its contractual claims assumes, wrongly, that it was improper for the Board to dismiss on procedural grounds. Due process requires notice and an opportunity to be heard on the *dispositive* issue, not an opportunity to be heard on issues that the tribunal properly does not need to reach. BLET was heard on the dispositive question of whether its failure to include evidence of conferencing required dismissal. As BLET admits, after the conferencing issue arose, the Board adjourned the proceedings and allowed both parties to submit additional briefing on the question. Resp.Br.13.

"Joint Exhibit Program" to omit the customary letters indicating that a conference was requested, if that is not in dispute. Amicus.Br.10-11. These instructions apply only to cases in which the parties agree to file joint exhibits (which did not occur here), and were not even promulgated until *after* the parties here filed their submissions. *Id.* at 11 n.7.

In that respect, this case is just like *Sheehan*. Indeed, BLET even characterizes the due process concern in *Sheehan* as whether the employee received an opportunity to be heard on the dispositive issue: "this Court found that Sheehan himself had received procedural due process, i.e., consideration of his tolling argument and a decision on the merits." Resp.Br.34. The employee in *Sheehan* did not receive an adjudication of the merits of his grievance.

Henry Bierce Co. v. NLRB, 23 F.3d 1101 (6th Cir. 1994), and *NLRB v. Complas Industries, Inc.*, 714 F.2d 729 (7th Cir. 1983), do not support Respondent's position for the same reason. Both involve situations in which the NLRB amended an unfair labor practice complaint in the middle of the administrative hearing to add an additional charge. The reviewing courts held that while the NLRB had the authority to amend the complaint, it was improper to do so without giving the company additional time to meaningfully respond to the amended charge. Respondent admits that it received a full opportunity to respond to the Board's jurisdictional concerns here. *See* Resp.Br.13.

Finally, to the extent that Respondent's argument rests on the proposition that the result in arbitration was simply unfair—a violation of what the Seventh Circuit called the rules of the "kindergarten playground," Pet.App.11a—it is worth emphasizing that the Board routinely applies a strict interpretation of its jurisdictional rules against carriers as well as unions. Indeed, UP has lost cases for no reason other than the failure to include the date of the hearing transcript in the on-property record. *See* First Div. Award, No. 25994 (Mar. 10, 2004) (available as explained *supra* n.5, and involving the same parties as this case). After decades of such rulings, both sides understand—or should understand—the risks of omitting any potentially relevant material from the record.

B. The First Division's Decision Did Not Violate Due Process

Even if there were something unexpected or surprising about the Board's application of its evidentiary and jurisdictional rules (although in this case clearly there was not), it could not possibly amount to a violation of due process. Respondent's due process theory would require courts to second-guess an arbitrator's resolution of every routine procedural dispute, nullifying Congress's intent that judicial review in this context be "'among the narrowest known to the law,'" *Sheehan*, 439 U.S. at 91 (citation omitted).

First, Respondent cannot deny the basic principle that any adjudicative process *always* involves the resolution of controversies about how broadly stated general rules should be applied to particular facts. *See* Pet.Br.47-54.

Respondent argues that the Board's decision "was not even a genuine 'interpretation' when the regulation being 'interpreted' could not logically apply to this class of evidence at all." Resp.Br.42. As noted above, Respondent's substantive arguments pertain only to 29 C.F.R. §301.5, and even if persuasive (which they are not) have no purchase whatsoever on §§301.2 or 301.6. Those sections provide ample independent support for the Board's holding.

More remarkably, Respondent is saying that the Board could not genuinely have been interpreting Circular One *because Respondent disagrees with the Board's interpretation.* The Seventh Circuit committed the same error. Hypothesizing that the rationale for the rule that the Board will only consider evidence in the record is that the carrier should have a chance to consider the evidence, the Seventh Circuit reasoned that there was no need to apply the rule to evidence of conferencing because it did not fit the rationale the Seventh Circuit made up. Pet.App.19a. But the Seventh Circuit ignored that the Board has an obligation to satisfy itself of its own jurisdiction, and might want evidence of conferencing to be included in the record simply to avoid engaging in unnecessary fact-finding, particularly because the Board regards itself as an appellate body which does not conduct evidentiary hearings. *See The Railway Labor Act* 407-08 (Michael E. Abram et al. eds., 2d ed. 2005). Or the Board might want "[t]o conserve time and expedite proceedings" by requiring parties to "prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions," 29 C.F.R. §301.6. Respondent and the Seventh Circuit should not be allowed to dictate a special exception to the Board's general prohibition against consideration of extra-record evidence in these circumstances.

The best interpretation of the statute and Circular One, considered as a whole, is the one applied by the First Division here. Indeed, the Board might have failed "to comply with the requirements of th[e] Act" and "to conform, or confine itself, to matters within the scope of [its] jurisdiction" if it had done anything else. 45 U.S.C. §153 First (q). Regardless, it simply is not a *due process* issue of any kind for the Board to interpret the procedural rules in the RLA and Circular One in a manner that Respondent and the Seventh Circuit now find unpersuasive. It does not violate due process, for example, for a lower court to dismiss a case on contestable evidentiary or statute of limitations grounds, even if an appellate court later reverses.

Second, Respondent persists in relying on retroactivity precedents that have nothing to do with due process or with adjudication. For example, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), addresses the retroactive application of new *statutes*, which do not participate in the traditional fiction applicable to adjudicative processes that judges simply declare what the law always was. A statute changes the law; a judge's interpretation of an existing rule on particular facts, or even his declaration of a new interstitial rule in entirely novel circumstances, does not. *Landgraf* explicitly distinguishes "the retroactive application of intervening *judicial* decisions," for which this Court has "established a firm rule of retroactivity," from the retroactive application of statutes, which bear a "presumption against" retroactivity. *Id.* at 278 & n.32; *compare, e.g., id.* at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."), *with Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) ("Nothing in the Constitution alters the fundamental rule of 'retrospective application' that has governed 'judicial decisions ... for near a thousand years.'") (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

Respondent similarly cites *Bowen v Georgetown University Hospital*, 488 U.S. 204 (1988), for the proposition that this Court has expressed its "distaste" for agency rulemaking by adjudication, Resp.Br.51, but *Bowen* has nothing to do with adjudication—agency or otherwise. Rather, it concerned an agency's power to promulgate "legislative regulations" that would be overtly retroactive in effect. *Bowen*, 488 U.S. at 208. It applied the rule that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* And it specifically concluded that a provision of the statute that *did* appear to permit limited retroactivity "applies only to case-by-case adjudication, not to rulemaking." *Id.* at 209.

Respondent's contention that the Divisions lack authority under the RLA to engage in "rulemaking by adjudication" has nothing to do with due process (although it too will be considered *infra*, in connection with Respondent's statutory arguments). Resp.Br.47-50. Even if a Division did somehow exceed its statutory authority, that would not be a constitutional issue.

BLET argues that "[i]n a system like the NRAB with very weak *stare decisis*, there is no particular logic for applying an unfair or surprising 'interpretation' retroactively—certainly not for the sake of any consistency." Resp.Br.50. Even if persuasive, that too would not rise to the level of a due process argument. Regardless, Respondent's suggestion makes no sense, and would render arbitral systems entirely unable to function. If novel interpretations are *not* applied to the parties at hand in a system with weaker *stare decisis*, then they will never be applied at all. Respondent's position is essentially that debatable interpretations can't be applied either retroactively or prospectively—which is another way of saying that the Board can never resolve any difficult interpretive question. This Court certainly has never suggested that the presumption of retroactivity attendant to judicial, agency, and arbitral adjudication would somehow disappear if a particular agency (or state judicial system) decided to substantially curtail the importance of *stare decisis.*

In any event, a concern for "consistency" is not the only reason why some retroactivity is tolerated in all adjudicative systems. Resp.Br.51. Application of "new" rules to the parties at hand provides greater incentive to litigants to argue in favor of legal change, *see James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) (Souter, J., concurring); may be necessary to comply with constitutional concerns, *id.* at 548-49 (Scalia, J., concurring); ensures the accuracy of newly-announced rules, Bradley S. Shannon, *The Retroactive & Prospective Application of Judicial Decisions,* 26 Harv. J.L. & Pub. Pol'y 811, 850-51 (2003); promotes efficiency, *id.* at 871; and slows the rate of legal change, which results in greater adherence to precedent, *id.* at 872.

III. THE ONLY TRIBUNAL THAT EXCEEDED ITS JURISDICTION HERE WAS THE SEVENTH CIRCUIT

Respondent also seeks affirmance on the alternative ground that the Board failed to "to conform, or confine itself, to matters within the scope of the division's jurisdiction." 45 U.S.C. §153 First (q).[9] Its claim rests on the theory that the Board exceeds its jurisdiction whenever it interprets the statute or regulations in a manner that a court, reviewing *de novo*, disagrees with—because in Respondent's view the Divisions have no statutory authority to interpret the RLA or Circular One, or at least are not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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[9] This argument presents a pure question of law that this Court can and should resolve without need for remand. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("purely legal question ... is 'appropriate for our immediate resolution'

Respondent entirely misconceives the issue. Arbitral panels do not exercise or need the power to engage in *rulemaking*, by adjudication or otherwise, in the sense of announcing prospective rules that would have the force of law, bind subsequent panels, and be entitled to *Chevron* deference from a court. NRAB panels simply exercise the power, inherent in any adjudicative process, to resolve the particular controversy before them.

The real question here is how (if at all) Congress intended for courts to review a Division's application of the broad rules outlined in the RLA and Circular One in particular circumstances that call for an exercise of judgment or the resolution of some interstitial ambiguity. Respondent's position seems to be that a reviewing court must set aside an award based on the RLA or Circular One whenever the court would have resolved a procedural ambiguity differently.

That is not the law. To the contrary, this Court has repeatedly enforced a strong presumption that "'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons, Inc. v. Livingston*, 376

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notwithstanding that it was not addressed by the Court of Appeals") (citation omitted).

U.S. 543, 557 (1964). Like this case, *Wiley* concerned a procedural rule requiring the parties to conference prior to arbitration. *Id.* at 555-56. The dispute concerned whether that requirement should be excused in light of one party's claim that it would have been futile or inappropriate in the particular circumstances of that grievance. This Court concluded that "labor disputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects," and that a rule giving courts greater power to review "procedural" than merits issues would be unworkable and "may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy." *Id.* at 556-58. This Court held that any doubts about whether required pre-arbitration procedures "have been followed or excused" must therefore be decided by the arbitrator, subject only to the same highly deferential judicial review appropriate to substantive aspects of the dispute. *Id.* at 557.

This Court reaffirmed those principles in *Howsam v. Dean Witter Reynolds, Inc.*, holding that "gateway procedural disputes" or issues of "procedural arbitrability," including "'whether ... conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. 79, 85 (2002) (citation omitted.) It explained that arbitrators are "comparatively more expert about the meaning of their own [procedural] rule" and hence "comparatively better able to interpret and apply it," and that "align[ing] (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Id.*; *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (applying Federal Arbitration Act principles by analogy in labor arbitration case, and holding that an arbitrator's refusal to consider particular evidence could be reviewed only if "in bad faith or so gross [an error] as to amount to affirmative misconduct").

There is no reason to believe that Congress envisioned a radically more intrusive role for courts in reviewing issues of "procedural arbitrability" arising out of Circular One than obtains everywhere else in the field of labor arbitration, or arbitration generally. This Court recognized in *Wiley* that *de novo* judicial review of procedural questions would be "contrary to the aims of national labor policy." 376 U.S. at 558. Those same considerations apply equally to arbitration under the RLA, which was enacted to provide for "the prompt and orderly settlement" of railroad labor disputes in order to "'prevent strikes'" and "safeguard the vital interests of the country" in uninterrupted rail service. 45 U.S.C. §§151a(4), (5); *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930) (citation omitted). And this Court made clear in *Sheehan* that "[c]haracterizing the issue presented as one of law" rather than of interpretation of the parties' agreement "does not alter the availability or scope of judicial review" under the RLA. 439 U.S. at 93.

The lower courts have generally held that the Board fails to "conform, or confine itself, to matters within the scope of [its] jurisdiction," 45 U.S.C. §153 First (q), when "its decision was 'wholly baseless and completely without reason'" or it "ignored 'clear and unambiguous provisions' in the parties' agreement." *See* Abram et al., *supra*, at 426-27. (citations omitted). That is the same highly deferential standard, drawn from this Court's *Steelworker Trilogy* cases, that governs judicial review of labor arbitration more broadly. There is no reason to suspect that Congress would have wanted a much more intrusive review standard for questions of procedural arbitrability arising under Circular One.

There is no statutory basis for setting aside this award. The Seventh Circuit recognized, the parties agree, and the rules make clear that (1) conferencing is required, and (2) all evidence must be submitted in the on-property record. Pet.App.12a-13a, 17a-18a. The Board's interpretation of these rules to mean that evidence of conferencing must be included in the on-property record was sound, and certainly not baseless or completely without reason. Nor is there any claim here that the Board ignored express terms of Circular One, the RLA, or the parties' agreement. To the contrary, the Seventh Circuit specifically recognized that the rules were silent as to how conferencing was to be proved. Pet.App.23a. Courts have consistently held that arbitrators are entitled to resolve interstitial gaps or ambiguities in procedural rules. *See, e.g., Norfolk & W. Ry. Co. v. Transp. Commc'ns Int'l Union*, 17 F.3d 696, 701-02 (4th Cir. 1994) (where agreement is silent, the parties have "effectively ceded to the arbitrators the task of defining the scope of their power"); *see also Finley Lines Joint Protective Bd. Unit 200 v. Norfolk S. Ry. Co.*, 312 F.3d 943, 947 (8th Cir. 2002) (Board acted within its jurisdiction when it decided evidentiary issue absent "'specific controlling language in the collective bargaining agreement'") (citation omitted); *Kotakis v. Elgin, Joliet & E. Ry. Co.*, 520 F.2d 570, 576 (7th Cir.) ("Congress clearly intended that the awards of the Adjustment Board be as unassailable as those of an arbitrator. ... Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board."), *cert. denied,* 423 U.S. 1016 (1975).

CONCLUSION

The decision of the Seventh Circuit should be reversed.

Respectfully submitted,

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SEPTEMBER 9, 2009

AMICUS
CURIAE
BRIEF

No. 08-604

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY
Petitioner,
v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE SEVENTH CIRCUIT'S JUDGMENT SHOULD BE AFFIRMED ON THE GROUND THAT THE NRAB FIRST DIVISION FAILED TO COMPLY WITH THE REQUIREMENTS OF THE RAILWAY LABOR ACT IN DISMISSING THE UNION'S CLAIMS WITHOUT SETTLING THE UNDERLYING MINOR DISPUTES 7

II. THE COURT OF APPEALS' JUDGMENT SHOULD BE AFFIRMED ON THE AVAILABLE STATUTORY GROUND RATHER THAN ON THE CONSTITUTIONAL GROUND RELIED UPON BY THE COURT BELOW 14

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page

14 Penn Plaza LLC v. Pyett, 556 U.S. ___ (April 1, 2009) 2

California v. Taylor, 353 U.S. 553 (1957) 8, 9

Chicago, Rock Island and Pacific Railroad Co. v. Wells, 498 F.2d 913 (7th Cir. 1974) 16

Edelman v. Western Airlines, 892 F.2d 839 (9th Cir. 1989) 17, 22

Edwards v. St. Louis-San Francisco Railroad Co., 361 F.2d 946 (7th Cir. 1966) 18, 19

Elgin, Joliet & Eastern Railway v. Burley, 325 U.S. 711 (1945) 8, 9, 15

Elmore v. Chicago & Illinois Midland Railway Co., 782 F.2d 94 (7th Cir. 1986) 18, 19, 20

English v. Burlington Northern Railroad Co., 18 F.3d 741 (9th Cir. 1994) 16, 22

Escambia County v. McMillan, 466 U.S. 48 (1984) 15

Gibson v. Berryhill, 411 U.S. 564 (1973) 15

Goff v. Dakota, Minnesota & Eastern Railroad Corp., 276 F.3d 992 (8th Cir. 2002) 16

Hall v. Eastern Air Lines, Inc., 511 F.2d 663 (5th Cir. 1975) 22

Hunt v. Northwest Airlines, Inc., 600 F.2d 176 (8th Cir. 1979) 22

Kinross v. Utah Railway Co., 362 F.3d 658 (10th Cir. 2004) 7, 15, 16

Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) 21

Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 23

Mathews v. Eldridge, 424 U.S. 319 (1976) 17

Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th Cir. 1987) 17

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 15

Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. ____, 129 S.Ct. 2504 (June 22, 2009) 15

Railroad Trainmen v. Chicago River & Indiana Railroad, 353 U.S. 30 (1957) 9

Radin v. United States, 699 F.2d 681 (4th Cir. 1983) 19

Shafii v. PLC British Airways, 22 F.3d 59 (2d Cir. 1994) 17, 22

Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157 (1966) 9, 10, 13, 14, 15

Union Pacific Railroad v. Sheehan, 439 U.S. 89 (1978) 9, 17

STATUTES AND REGULATIONS

45 U.S.C. § 152 Second 8

45 U.S.C. § 153 2

45 U.S.C.§ 153 First 2

45 U.S.C. § 153 First (b) 20

45 U.S.C. § 153 First (c) 20

45 U.S.C. § 153 First (g) 20

45 U.S.C. § 153 First (h) 2

45 U.S.C. § 153 First (i) 8, 10

45 U.S.C. § 153 First (j) 15

45 U.S.C. § 153 First (k) 9, 20

45 U.S.C. § 153 First (l) 9, 19, 20

45 U.S.C. § 153 First (m) 9, 20

45 U.S.C. § 153 First (n) 9, 20

45 U.S.C. § 153 First (q) .... *passim*

45 U.S.C. § 153 First (t) 19

45 U.S.C. § 153 First (u) 19

45 U.S.C. § 153 First (v) 10

45 U.S.C. § 153 First (w) 19

45 U.S.C. § 153 Second 2, 21

45 U.S.C. § 184 .... 2, 21, 22, 23

45 U.S.C. § 185 23

29 C.F.R § 301.5(d) 10

29 C.F.R § 301.5(e) 10

29 C.F.R § 301.7(b) 10, 11, 13

MISCELLANEOUS

Abram, *et al.*, eds., *The Railway Labor Act* (2d ed. 2005) 9

"Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act," Comptroller General Opinion B-305484 (June 2, 2006) 20

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Vernon, "Arbitration in the Railroad Industry," in Bornstein & Gosline, eds., *Labor and Employment Arbitration* (1st ed. 1996) 9

IN THE
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UNION PACIFIC RAILROAD COMPANY,
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BROTHERHOOD OF LOCOMOTIVE ENGINEERS
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**On Writ of Certiorari to the
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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of 11 million working men and women.[1]

The instant case presents an important question concerning the proper scope of judicial review of arbitration awards issued by Divisions of the National Railroad Adjustment Board. The AFL-CIO has frequently filed briefs in cases before this Court that concern arbitration under collective bargaining agreements. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. ___ (April 1, 2009). A number of AFL-CIO affiliates represent substantial numbers of railroad workers and frequently bring minor disputes over the application of their collective bargaining agreements before the National Railroad Adjustment Board for settlement.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

The Railway Labor Act mandates a system of compulsory arbitration for the settlement of disputes – known as "minor disputes" – between rail carriers and unions concerning the interpretation and application of their collective bargaining agreements. 45 U.S.C. § 153. One available avenue for the settlement of minor disputes is through a final and binding arbitration award by a Division of the National Railroad Adjustment Board. 45 U.S.C. § 153 First. Each of the NRAB's four Divisions is composed of equal numbers of carrier-appointed and union-appointed members, and each Division has jurisdiction over disputes concerning particular classes or crafts of railroad employees. 45 U.S.C. § 153 First (h).[2]

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[2] As an alternative to taking their disputes to a Division of the NRAB, rail carriers and unions may establish arbitration boards by mutual agreement to resolve minor disputes. 45 U.S.C. § 153 Second. Minor disputes between air carriers and unions, which are also covered by the RLA, are settled exclusively through awards by arbitration boards established by mutual agreement. 45 U.S.C. § 184.

The instant case was brought in federal court as a challenge to five related awards issued by the First Division of the NRAB, which has jurisdiction over minor disputes involving the so-called "operating crafts," such as engineers and trainmen. Each of the challenged awards dismissed a claim that a particular engineer had been unjustly disciplined by the Union Pacific Railroad ("the Carrier") in violation of its agreement with the Brotherhood of Locomotive Engineers and Trainmen, which is administered by the BLET General Committee of Adjustment ("the Union"). The awards did not reach the merits of the contract disputes but rather dismissed the claims on the ground that the Union's written presentation of its case – its "original written submission" in RLA usage – did not satisfy a procedural prerequisite to the Division's consideration of the Union's claims, namely that the submission did not contain evidence that each of the disputes had been subject to the statutorily-required on-site settlement "conference" between the Carrier and the Union prior to the Union's requests that the NRAB settle the disputes. *See* Pet. App. 72a ("In the instant case, therefore, since no evidence of conference was set forth in the on-property record, the Board is without authority to assume jurisdiction over the claim.").

The Union filed a petition to review and set aside the awards under § 3 First (q) of the Railway Labor Act on the grounds that the First Division had "unlawfully held that [it] did not have authority to assume jurisdiction over [the] cases because there was no evidence of a 'conference' between the parties in the [Union's submission to the NRAB]." Petition to Review ¶ 1. The Union contended that "the dismissals violate the Act by requiring that conferencing be alleged and proved in the original submission of briefs when nothing in the Act or the Circular [containing the NRAB's procedural rules] imposes such a technical pleading or evidentiary requirement." *Id.* ¶ 3.[3] Alternatively, the Union alleged that the First Division had denied the Union procedural due process by refusing to allow it to present evidence of conferencing when the issue was belatedly raised by a carrier member of the arbitration panel at the hearing on the claims. *Id.* ¶ 5.

The District Court dismissed the Union's petition. Based on its reading of various NRAB Division awards, that Court concluded that, in all instances, evidence of conferencing must be included in a party's original written submission to the NRAB as a prerequisite to a Division settling the dispute. Pet. App. 38a-42a.

The Seventh Circuit reversed the District Court. The Court of Appeals began by noting that "the essence of the conflict boils down to a single question: is written documentation of the conference in the on-property record a necessary prerequisite to arbitration before the NRAB?" Pet. App. 6a. The Seventh Circuit recognized that the Union's petition for review presented this question in "both a statutory and constitutional framework." *Id.* at 6a. But, bypassing the statutory ground for review asserted by the Union's petition, the Seventh Circuit ruled that the First Division dismissals of the Union's claims "ran afoul of the due process clause," *ibid.*, by imposing "a new procedural rule without adequate notice to the parties" and thereby "den[ying] those parties first, and most importantly, the opportunity to comply with the rule, and ultimately, a fair opportunity to be heard," *id.* at 11a. On this ground, the Court of Appeals found that the First Division's "decision to dismiss violated the due process rights of the Organization," and reversed the decision of the District Court. *Id.* at 23a.

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[3] *See also id.* ¶ 4 ("the NRAB unlawfully evades . . . its authority as an administrative agency with primary jurisdiction over these claims") & ¶ 61 ("the NRAB has . . . acted in a manner that is in conflict with the strong public policy to hear and decide disputes on the merits and not to dismiss such disputes based on procedural pleading technicalities imposed by the NRAB on an ad hoc improvisatory manner and not set out in the Act or Circular No. 1").

SUMMARY OF ARGUMENT

I. The judgment of the Court of Appeals can and should be affirmed on the statutory ground that the NRAB First Division failed to comply with the requirements of the Railway Labor Act in dismissing the Union's claims. 45 U.S.C. § 153 First (q). A Division of the NRAB has a statutory duty to settle all minor disputes properly brought before it. The Union's claims were properly brought before the First Division, and the First Division, therefore, had a statutory duty to settle the minor disputes presented by the Union's claims on the merits.

The First Division's asserted ground for dismissing the Union's claims – that the Union failed to meet the procedural prerequisite of including proof of on-site conferencing in its original written submission to the NRAB – is contrary to the NRAB procedural rules. The NRAB rules only require the parties to include in their submissions evidence relevant to matters in dispute between them. And, where there has been no dispute over the occurrence of on-site conferencing, as is the case here, the NRAB rules do not require that proof of conferencing be included in the parties' original written submissions. Since the Union's claims were presented in a manner consistent with the Act and the NRAB rules, the First Division had a statutory duty to settle those minor disputes on the merits, and its refusal to do so constituted a failure of the Division to comply with the requirements of the Act.

II. This Court need not, and therefore should not, reach the constitutional Due Process Clause ground on which the Court of Appeals based its judgment. The Railway Labor Act itself provides for procedural due process in the arbitration proceedings before the NRAB Divisions. Deprivation of these due process guarantees by a Division constitutes a violation of the RLA, and the resulting Division award would be subject to review and to being set aside on that statutory ground. Aside from being unnecessary, deciding this case on constitutional grounds would require the Court to address difficult "governmental action" issues that have not been addressed by any of the lower courts.

ARGUMENT

The Seventh Circuit decision setting aside the NRAB First Division awards at issue here should be affirmed on the ground that, in dismissing the Union's claims, the Division failed to comply with the requirements of the Railway Labor Act. 45 U.S.C. § 153 First (q).[4] Given that statutory ground for the decision below, there is no need for this Court to reach the question of whether the First Division awards were reviewable on the nonstatutory ground that the Division violated the Due Process Clause of the Fifth Amendment.

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[4] The Petition to Review challenged the First Division's dismissals on the grounds that they "violate the Act . . . by requiring that conferencing be alleged and proved in the original submission of briefs when nothing in the Act or the Circular imposes such a technical pleading or evidentiary requirement," ¶ 3, and that they "fail[] to conform [the NRAB's] jurisdiction to that required by the law" in that they "unlawfully evade[] . . . [the NRAB's] authority as an administrative agency with primary jurisdiction over the[] claims," ¶ 4. The RLA provides that NRAB awards may be set aside both "for failure of the division to comply with the requirements of th[e] Act" and "for failure of the order to conform . . . to matters within the scope of

I. THE SEVENTH CIRCUIT'S JUDGMENT SHOULD BE AFFIRMED ON THE GROUND THAT THE NRAB FIRST DIVISION FAILED TO COMPLY WITH THE REQUIREMENTS OF THE RAILWAY LABOR ACT IN DISMISSING THE UNION'S CLAIMS WITHOUT SETTLING THE UNDERLYING MINOR DISPUTES.

Section 3 First (q) of the Railway Labor Act provides that "any employee or group of employees, or any carrier, [who] is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute [concerning the interpretation of a railroad collective bargaining agreement] referred to it, or [who] is aggrieved by any of the terms of an award . . . may file . . . a petition for review of the division's order." 45 U.S.C. § 153 First (q). Among the grounds on which "the order of the division may be set aside, in whole or in part, or remanded to the division" is "failure of the division to comply with the requirements of th[e] Act." *Ibid.* Thus, in § 3 First (q), "Congress allowed for review of the Board's failure to comply with the requirements of the Railway Labor Act, including procedural requirements ensuring claimants an opportunity to present evidence and argue their case." *Kinross v. Utah Railway Co.*, 362 F.3d 658, 662 n. 3 (10th Cir. 2004).

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the division's jurisdiction." 45 U.S.C. § 153 First (q). In the instant case, these two statutory grounds of review are largely to the same effect, and for ease of reference, we treat with only the first of the statutory grounds in this brief.

In this case, the First Division failed to comply with the RLA by dismissing – on spurious procedural grounds – claims that the Union had properly brought before the Division for settlement. *See* Petition to Review ¶s 1 & 3 (invoking this ground for review). The awards challenged by the Union's petition for review should, therefore, be set aside and the disputes remanded to the First Division to be settled on the merits as required by the Act.

A. The Railway Labor Act provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" – the so-called "minor disputes" – "may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board" for resolution through arbitration awards that are "conclusive on the parties." 45 U.S.C. § 153 First (i) & (q).[5]

"The Board [i]s divided into four divisions, each with jurisdiction over particular crafts or classes and their disputes," and each Division is "composed of equal numbers of carrier representatives and representatives of unions." *California v. Taylor*, 353 U.S. 553, 558 (1957). In this regard, § 3 First (k) states that "final awards as to any . . . dispute must be made by the entire division," and § 3 First (k) through (n) specify how the Divisions are to proceed in making such awards. 45 U.S.C. § 153 First (k) - (n). As this Court has recognized, § 3 First (i) expressly provides the parties before a Division the procedural "[r]ights of notice, hearing, and participation or representation." *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 727.[6]

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[5] The RLA provides that, prior to referring a dispute to the NRAB for settlement, the dispute must first be "handled in the usual manner up to and including the chief operating officer of the carriers designated to handle such disputes" and that there was a "fail[ure] to reach an adjustment in this manner." 45 U.S.C. § 153 First (i). This is part of the Act's general requirement that "[a]ll disputes" – including the minor disputes that may be referred to the NRAB – "shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. § 152 Second. *See Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 725 (1945) ("the duty to negotiate is imposed for both grievances[, i.e., minor disputes,] and major dispute[, i.e., contract negotiations]").

The RLA's detailed statutory provisions regarding the handling and resolution of minor disputes are intended "to provide a[n] *effective process of settlement*" of such disputes. *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. at 725 (emphasis added). "The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions." *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 94 (1978). "[T]he provisions [of the RLA] dealing with the Adjustment Board" thus establish a system of "compulsory arbitration in this limited field." *Railroad Trainmen v. Chicago River & Indiana Railroad*, 353 U.S. 30, 39 (1957). "The railroad[s], the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle [minor] disputes," and, by the terms of the statute, the Divisions of the NRAB have a "duty to settle [such] dispute[s]." *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 162 (1966).

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[6] For detailed descriptions of the minor dispute settlement process in the railroad industry *see* Vernon, "Arbitration in the Railroad Industry," in Bornstein & Gosline, eds., *Labor and Employment Arbitration*, ch. 89 (1st ed. 1996), and Abram, *et al.*, eds., *The Railway Labor Act* 402-416 (2d ed. 2005).

B. In this case, the First Division of the NRAB violated that statutory duty by refusing to settle the minor disputes the Union referred to the Division on the spurious procedural ground that the Union had failed to meet its "duty and responsibility of including in the[] original written submission all known relevant, argumentative facts and documentary evidence." 29 C.F.R. § 301.7 (b).

Section 3 First (i) provides in relevant part that "disputes may be referred by petition of the parties or by either party to the appropriate Division of the Adjustment Board with a full statement of the facts and all supporting data *bearing upon the disputes*." 45 U.S.C. § 153 First (i) (emphasis added). "The Adjustment Board," acting pursuant to its authority to "adopt such rules as it deems necessary to control proceedings before the respective Divisions," 45 U.S.C. § 153 First (v), has implemented the requirements of § 3 First (i) by providing that "[t]he parties are . . . charged with the duty and responsibility of including in their original written submission all *known relevant, argumentative facts* and documentary evidence." 29 CFR § 301.7(b) (emphasis added). *See also* 29 C.F.R. § 301.5 (d) & (e) ("all relevant, argumentative facts"). Interpreting the regulation's requirement that the parties are to "includ[e] in their original written submission all *known relevant, argumentative facts* and documentary evidence," 29 C.F.R. § 301.7 (b) (emphasis added), the NRAB has issued an Instructions Sheet advising that "[r]epresentatives may wish to *omit* documents that are unimportant and/or irrelevant to the disposition of the dispute; for example, . . . *letters requesting a conference (assuming that is not in the dispute).*" NRAB Instructions Sheet, p. 5, Joint Exhibit Program (July 1, 2003), *available at* http://www.nmb.gov/arbitration/nrab-instruc.pdf (italicized emphasis added).[7]

Given the controlling NRAB rules, the First Division acted contrary to law in dismissing the Union's claims because of "[t]he absence of such proof [of conferencing] within the Organization's [original written submission]." Pet. App. 71a. That ruling by the First Division is contrary to the NRAB rules providing that submission statements are only required to contain "all known relevant, argumentative facts and documentary evidence," 29 C.F.R. § 301.7 (b), and to the NRAB's specific advice that proof of conferencing, such as "letters requesting a conference . . . may [be] omit[ted]" from the submission as "unimportant and/or irrelevant to the disposition of the dispute" where conferencing "is not an issue in the dispute," NRAB Instructions Sheet, *supra*, p. 5.

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[7] The purpose of this suggestion is to further the NRAB's Joint Exhibits Program by reducing the filing of "unnecessary" exhibits. *Ibid.* The express suggestion that parties *not* include in their submission "letters requesting a conference" where "that is not an issue in the dispute" shows that, by the NRAB's interpretation of its own regulations, evidence of conferencing is "unnecessary" where conferencing "is not an issue in dispute." The Instructions Sheet interpreting the NRAB rules was issued shortly after the Union made its original written submissions to the First Division and long before the March 15, 2005 hearing at which one of the First Division members raised a question as to the adequacy of the Union's submissions. The governing NRAB regulations interpreted by the Instructions Sheet were issued by the Adjustment Board as Circular No. 1 on October 10, 1934.

The First Division's ruling is contrary to the NRAB rules governing the contents of original written submissions, because there has never been any dispute in this case between the Carrier and the Union over whether conferences had been held regarding the claims at issue.

These NRAB proceedings began, as do all such proceedings, with the Union sending to the NRAB Arbitration Assistant a brief "notice of intent" to submit a particular, identified minor dispute to the NRAB, with a copy to the Carrier. *See* NRAB Instructions Sheet, *supra*, p. 4. The appropriate NRAB Division responds to such a notice of intent by assigning a case number and setting a particular date for the simultaneous filing of written submissions by the parties.[8]

Where there is a dispute over conferencing, the normal practice would be for the Carrier to raise a procedural objection based on the failure to hold a conference either just before or just after the Union filed its notice of intent bringing the claim to the NRAB. Petition to Review ¶ 16. The Carrier made no such objection to the NRAB taking the claims in response to the Union's notice of intent. *Id.* ¶ 18. Nor did the Carrier make any such objection in its original written submission. *Ibid.* The question of the inclusion of proof of conferencing in the Union's original written submission was only raised by a railroad-appointed member of the First Division panel at the hearing on the Union's claims. Even then, the

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[8] Since 2003, the Divisions have responded to notices of intent by sending a form letter, which includes an invitation to submit procedural questions directly to the Division chairs. NRAB Instructions Sheet, *supra*, pp. 9-10.

Carrier did not take the position that conferences had not, in fact, taken place.[9]

The RLA provides that an NRAB Division "must exercise its exclusive jurisdiction to settle disputes like this" that are brought before the Division in accordance with the statute and the NRAB rules. *Transportation-Communication Employees Union*, 385 U.S. at 160. Thus, the First Division was not free to dismiss the Union's claims here and refuse to settle the underlying minor disputes on the ground that the Union failed to include *irrelevant* evidence of conferencing in its original written submission when conferencing was *not* an issue in dispute between the parties. For the First Division is bound by the procedural rules adopted by the NRAB, including the rule that limits the parties' duty with respect to their original written submission to including "all *known, relevant, argumentative* facts and documentary evidence," 29 CFR § 301.7(b) (emphasis added), a category the NRAB has said does *not* encompass documents that are "unimportant and/or irrelevant to the disposition of the dispute[s]; for example, . . . letters requesting a conference [where] that is not an issue in the dispute," NRAB Instructions Sheet, p. 5, *supra* (emphasis in original).

To be sure, in support of its dismissal, the First Division does cite several awards by various NRAB Divisions. Pet. App. 71a. However, as the Seventh Circuit demonstrated – and as even the Carrier acknowledges, Pet. Br. 46 – the cited awards "do not indicate whether the Board dismissed the cases because conferencing did not in fact occur . . . or because the parties did not put written evidence of conferencing in the on-property record." Pet. App. 15a. Thus, the cited awards do *not* stand for the proposition that, even where there is no dispute between the carrier and the union concerning conferencing, the union's original written submission must as a procedural precondition include proof of conferencing.

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[9] The first time the Carrier even suggested that it might contest the fact that conferences had been held was in its petition for rehearing to the Seventh Circuit, where the Carrier asserted that "[i]f forced to do so, the railroad certainly will dispute the allegation that conferences took place with respect to at least some, if not all, of the five grievances at issue." Pet. Rehearing 7. *See* Pet. Br. 9 n. 2.

In sum, by refusing to settle the disputes brought before the First Division by the Union in accordance with the NRAB rules, the First Division has "abdicate[ed] its duty to settle [such] dispute[s]." *Transportation-Communication Employees Union*, 385 U.S. at 162. The First Division awards dismissing those claims, therefore, "should be set aside . . . for failure of the Division to comply with the requirements of this Act." 45 U.S.C. § 153 First (q).

II. THE COURT OF APPEALS' JUDGMENT SHOULD BE AFFIRMED ON THE AVAILABLE STATUTORY GROUND RATHER THAN ON THE CONSTITUTIONAL GROUND RELIED UPON BY THE COURT BELOW.

There is no warrant for deciding in this case the conceptually difficult constitutional question of whether the courts, as a supplement to the specific review authority over NRAB Division awards provided in § 3 First (q), have a free standing review authority over such awards to redress violations of the Due Process Clause of the Fifth Amendment.

A. First of all, as we have shown, in this case the courts below had express statutory authority to review and vacate the First Division awards "for failure of the division to comply with the requirements of th[e] Act." 45 U.S.C. § 153 First (q). And, as this Court recently noted, "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. ___, 129 S.Ct. 2504, 2513 (June 22, 2009), quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984).

B. Second, what is true here – that the statutory review authority provided by § 3 First (q) is fully sufficient to ensure that the parties to an NRAB Division arbitration proceeding are accorded procedural due process – is true for the run of cases challenging Division awards on procedural due process grounds.

The essential requirements of procedural due process are "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). As this Court has recognized, the Railway Labor Act expressly provides "[r]ights of notice, hearing, and participation or representation" in proceedings before a Division of the NRAB. *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. at 727 (citing RLA § 3 First (j)).[10] And, the failure of an NRAB Division to accord any of these rights constitutes grounds for setting aside its award under § 3 First (q). *See Transportation-Communication Employees Union*, 385 U.S. at 165 n. 4 . Thus, as the Tenth Circuit aptly observed, "the Railway Labor Act itself provides for sufficient procedural due process within its own boundaries" to

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[10] Due process also requires an unbiased decision maker. *See Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). And, the RLA provides that an award may be vacated "for fraud or corruption by a member of the Division making the order." 45 U.S.C. § 153 First (q).

"meet constitutional requirements." *Kinross*, 362 F.3d at 662 n. 3.

Indeed, as the parties to this case acknowledge, there is effectively no difference between a statutory challenge to an award on the grounds that the Division failed to comply with the RLA's notice and fair hearing requirements and the constitutional Due Process Clause challenges to Division awards that have been entertained in some of the circuits. *See* Pet. Br. 37 ("The statutory review provisions are plainly generous enough to permit litigants to raise all of the simple, common, easily adjudicated, and likely to be meritorious claims that sail under the flag of due process of law – including claims seeking to vindicate a right to fair notice, an opportunity to be heard, and an unbiased decisionmaker."); Br. Opp. 1 ("The grounds for review under the Fifth Amendment of the constitution are effectively the same as those provided by the Railway Labor Act itself.").

Reflecting that effective identity, even the circuits that entertain constitutional due process challenges treat "the RLA provisions governing Board hearings" as defining what "due process requires." *Goff v. Dakota, Minnesota & Eastern Railroad Corp.*, 276 F.3d 992, 997 (8th Cir. 2002). *See also English v. Burlington Northern Railroad Co*, 18 F.3d 741, 744 (9th Cir. 1994) ("the RLA provisions governing Board hearings" define what "due process requires"); *Chicago, Rock Island and Pacific Railroad Co. v. Wells*, 498 F.2d 913, 917 (7th Cir. 1974) (finding that "the Division denied the plaintiff Railroad due process under the Fifth Amendment," the court "remanded to the Division with directions that plaintiff be permitted to file a written submission . . . and to appear before the Division at a hearing as contemplated by § 3 First (j) of the Act"). That being so, all of the constitutional

Due Process Clauses claims that have been deemed cognizable could easily have been brought and decided as statutory challenges.[11]

Against that background – and since "Section 153 First (q) unequivocally states that 'the findings and order of [an NRAB Division] shall be conclusive on the parties' and may be set aside only for the three reasons specified therein," *Sheehan*, 439 U.S. at 93 – this Court should be slow in reaching the question of whether or not there is an additional, constitutional ground for judicial review of NRAB Division awards.

C. There is, moreover, a third consideration that reinforces the prudential case against reaching and deciding the question of whether the courts have Due Process Clause authority to review NRAB Division awards.

"Procedural due process imposes constraints on *governmental* decisions . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (emphasis added). Thus, a necessary predicate to challenging an RLA-mandated arbitration award on due process grounds is that the award constitutes a "governmental decision[]." Yet, the circuits that entertain Due Process Clause challenges to RLA arbitration awards have done little more than presume that those awards are "governmental decisions," even though there are indications that this presumption might be wrong and that the awards are not governmental decisions. Thus, in order to decide this case under the Due Process Clause, the Court would have to confront a serious "governmental action" question that has never been squarely addressed by the lower courts.

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[11] *See, e.g., Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722 (7th Cir. 1987) (employee discharged for theft alleged that "the NRAB did not afford him the opportunity to show that perjury occurred at his . . . disciplinary hearing" or "the opportunity to submit his criminal acquittal"); *Edelman v. Western Airlines*, 892 F.2d 839, 847 (9th Cir. 1989) ("effectively denied a hearing"); *Shafii v. PLC British Airways*, 22 F.3d 59, 60 (2d Cir. 1994) ("arbitrator . . . denied his attorney's request to present one witness and several documents during the proceeding").

The entirety of the circuit courts' governmental action analysis regarding arbitration awards by NRAB Divisions is the following passage from a Seventh Circuit opinion:

> "The National Railroad Adjustment Board, however, while private in fact, is public in name and function; it is the tribunal that Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law." *Elmore v. Chicago & Illinois Midland Railway Co.*, 782 F.2d 94, 96 (7th Cir. 1986).

This passage, however, is nothing but *dicta*. The holding of *Elmore* is that, even though "the Railway Labor Act forces railroads and workers to arbitrate their disputes and to establish as part of the arbitration process an initial grievance procedure on the property," this does not "turn[] the railroad's grievance procedure into a governmental procedure required to conform to the requirements of due process." *Ibid.* What is more, the *Elmore dicta* conflicts with the earlier *holding* of *Edwards v. St. Louis-San Francisco Railroad Co.*, 361 F.2d 946, 955 (7th Cir. 1966), that, "[l]ooking to the nature of the Board itself," a "procedural" ruling by the NRAB that is "contemplated by the statute, cannot be said to be of that category of 'governmental action' prohibited by the

Constitution[]" that is subject to constitutional constraints.[12]

It is, moreover, not well-considered *dicta.* As for the NRAB being "public in name and function," the Seventh Circuit merely observed that "[t]he tribunal [is] grandly styled the National Railroad Adjustment Board" and that "it is the tribunal that Congress has established to resolve certain disputes in the railroad industry." *Elmore,* 782 F.2d at 95-96. It might be added, in this regard, that the federal government does provide certain administrative and financial support to the operations of the NRAB. 45 U.S.C. § 153 First (l), (t), (u) & (w).

On the other side of the public/private equation, it is, as the Seventh Circuit also observed, very much to the point that "the National Railroad Adjustment Board[] in fact consists of private individuals chosen by the railroad industry and the railroad unions." *Elmore,* 782 F.2d at 95. Further indicating its private nature is the fact that "[t]he NRAB does not formulate policy or enforce laws," *Radin v. United States,* 699 F.2d 681, 686 (4th Cir. 1983), but rather settles private disputes concerning private agreements. And, like the statutorily-mandated initial grievance procedures for settling such disputes that have uniformly been found to be beyond Due Process Clause review, the NRAB Divisions are not "required or even encouraged" by the RLA "to act irregularly in [deciding such] grievances." *Elmore*, 782 F.2d at 96.

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[12] That being so, the *Edwards* opinion went on to observe, any "attempt to equate the review functions of the Adjustment Board with prohibited governmental action ultimately resolves itself into a direct attack upon the constitutionality of those provisions of the Railway Labor Act creating the Adjustment Board with authority to finally settle disputes which evolve otherwise unadjusted out of the grievance procedure agreed upon between the parties." 361 F.2d. at 955. And, the court concluded that the provisions of the RLA in this regard do not "infringe due process." *Ibid.*

It is particularly to the point that NRAB arbitration awards are issued, not by the NRAB itself, but by the Divisions of the NRAB. 45 U.S.C. § 153 First (k) & (m). The members of the Divisions are appointed by the carriers and the national labor organizations and have their compensation and expenses paid by the appointing carriers and labor organizations.. 45 U.S.C. § 153 First (b), (c) & (g). And, the resolution of disputes brought before the Divisions is by majority vote of the members of the Division. 45 U.S.C. § 153 First (n).

Where the members of a Division cannot agree on an award, they are required to select a neutral referee to sit as a temporary member of the Division for purposes of making an award. 45 U.S.C. § 153 First (l). If the members cannot agree upon a referee, they may ask the National Mediation Board to appoint one. *Ibid.* The neutral referees are paid by the NMB. *Ibid.* The referees are not, however, employees of the federal government. *See* "Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act," Comptroller General Opinion B-305484, at 3 (June 2, 2006) ("arbitrators serve as independent contractors and not as employees of the federal government"). Indeed, employment by the federal government disqualifies an individual from serving as an NMB-appointed referee. *See* "Uniform Guidelines for Placement on the National Mediation Board's Roster of Arbitrators," 17 NMB No. 54 (May 25, 1990).

In sum, the awards of NRAB Divisions are entirely the decisions of private arbitrators who are charged with resolving private disputes growing out of private collective bargaining agreements and who do so without any control or even influence by the federal government. All that being so, the proposition that the awards of NRAB Divisions are "governmental decisions" subject to direct Due Process Clause constraints is dubious to say the least. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397-400 (1995).

An additional difficulty is the fact that the RLA provides for arbitration options other than arbitration by the NRAB Divisions. Indeed, far more awards are issued by the alternative boards of adjustment than are issued by the NRAB Divisions. *See* National Mediation Board, Annual Performance & Accountability Report, FY 2008 (Nov. 14, 2008), Appendix A, *available at* http://www.nmb.gov/documents/nmb_ar08.pdf. And, the proposition that the arbitration awards resulting from resort to these alternative options are "governmental decisions" subject to direct Due Process Clause constraints has no discernable legal basis.

Carriers and railroad labor organizations may provide for the settlement of their minor disputes by tripartite arbitration panels created by mutual agreement. 45 U.S.C. § 153 Second. Some of these arbitration panels are formed and administered solely by the parties with no involvement of the National Mediation Board. Others may be created solely by private agreement or with the assistance of the NMB and may have NMB-paid neutral referees. *Ibid.* With regard to the airline industry, the RLA imposes on air carriers and labor organizations – in lieu of the NRAB or to the airline industry equivalent – "the duty . . . to establish a board of adjustment" having the same jurisdiction to settle minor disputes as the non-NRAB boards of adjustment permitted to rail carriers and rail labor organization. 45 U.S.C. § 184.[13]

The only decision even attempting to explain the basis for subjecting awards by these privately created boards of adjustment to Due Process Clause review is *Shafii v. PLC British Airways, supra,* which has the following to say about the neutral member of the airline industry system boards of adjustment: "Because the arbitrator occupies the position of the statutorily-created NRAB, he or she is subject to the same statutory and constitutional constraints as the NRAB." 22 F.3d at 61 (citations omitted). Proceeding on the assumption that the privately created airline boards of adjustment and the NRAB are "associated entities," the *Shafii* court then quotes the Seventh Circuit's description of the NRAB as "private in fact, . . . public in name and function" as justifying the conclusion that the arbitration awards of the NRAB Divisions and the arbitration awards of the airline system boards of adjustment are equally subject to Due Process Clause review. *Id.* at 64.

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[13] The statutory grounds for reviewing arbitration awards of the NRAB Divisions stated in RLA § 3 First (q) apply to the awards of adjustment boards created by agreement between the rail carriers and labor organizations pursuant to RLA § 3 Second, *English v. Burlington Northern Railroad, supra,* 18 F.3d at 743 n. 1, and to boards of adjustment created by agreement between air carriers and labor organizations pursuant to RLA § 204, *Hunt v. Northwest Airlines, Inc.*, 600 F.2d 176, 178 (8th Cir. 1979). Those courts that entertain procedural due process challenges to arbitration awards covered by the RLA make no distinction between awards issued by NRAB Divisions and awards issued by boards of adjustment created by private agreement. *See, e.g., Edelman v. Western Airlines, supra,* 892 F.2d at 847; *Hall v. Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975).

The obvious flaw in the *Shafii* court's analysis is that minor disputes in the airline industry are *not* subject to the jurisdiction of the NRAB at all. *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685-86 (1963).[14] The boards of adjustment created by agreement between air carriers and labor organizations are not related in any way to the NRAB and are most certainly not "associated entities." Thus, not even the dubious points that have been made in support of the proposition that the NRAB Divisions are governmental decisionmakers have any application to the airline boards of adjustment, which are private decision making bodies "established by agreement" between the parties. 45 U.S.C. § 184.

The salient point of all this is that Due Process Clause review of arbitration awards by NRAB Divisions implicates difficult – and hitherto unexplored – governmental action issues that can and should be avoided by deciding this case on statutory rather than constitutional grounds.

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[14] Section 205 gives the National Mediation Board the authority to create a National Air Transport Adjustment Board to resolve minor disputes in a manner similar to that of the NRAB. 45 U.S.C. § 185. But the NMB has never exercised that authority.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS
CURIAE
BRIEF

No. 08-604

Supreme Court, U.S.
FILED
AUG 14 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

UNION PACIFIC RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF *AMICUS CURIAE* BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, NATIONAL DIVISION, IN SUPPORT OF RESPONDENT

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 7

ARGUMENT 12

I. THE DECISION BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE BOARD VIOLATED THE REQUIREMENT OF THE RAILWAY LABOR ACT THAT THE RAILROAD EMPLOYEE BE RENDERED AN AWARD ON THE MERITS 12

II. WHETHER STATED IN TERMS OF DUE PROCESS, PUBLIC POLICY OR OTHER NON-STATUTORY GROUNDS, RAILROAD LABOR ARBITRATION AWARDS ARE OFTEN CHALLENGED AND REVIEWED ON BASES OTHER THAN THOSE SPECIFICALLY LISTED IN SECTION 3 OF THE ACT 17

III. BECAUSE THIS IS A SIMPLE CASE THAT HAS NOT FREQUENTLY OCCURRED, PRESENTS A SIMPLE QUESTION NOT REQUIRING A CONSTITUTIONAL ANSWER, AND IS UNLIKELY TO REOCCUR, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED 19

TABLE OF CONTENTS – Continued

Page

IV. SHOULD THE COURT REACH THE CONSTITUTIONAL QUESTION, IT SHOULD AFFIRM THE SEVENTH CIRCUIT'S RULING THAT THE EMPLOYEES WERE DENIED DUE PROCESS 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Atchison, Topeka and Santa Fe Railway Co. v. United Transportation Union, 3 F.3d 355 (5th Cir. 1999) 18

BNSF Railway Co. v. Brotherhood of Locomotive Engineers and Trainmen, 524 F.Supp.2d 818 (N.D.Tex. 2007) 18

Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co., 373 U.S. 33 (1963) 2, 4

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30 (1957) 2, 8, 15

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 23

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) 2, 3

Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000) 18

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1945) 3, 14, 15

Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257 (1965) 15

Hall v. Eastern Airlines, 511 F.2d 663 (5th Cir. 1975) 11

Hornsby v. Dobard, 291 F.2d 483 (5th Cir. 1961) 11

TABLE OF AUTHORITIES – Continued

Page

Jones v. St. Louis – San Francisco Railway Co., 728 F.2d 257 (6th Cir. 1984) 15

Kinross v. Utah Railway Co., 362 F.3d 658 (10th Cir. 2004) 15

Mathews v. Eldridge, 424 U.S. 319 (1976)................ 16

Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).. 22

Union Pacific Railroad Co. v. Price, 360 U.S. 601 (1959).. 15

Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978)...10, 13

Union Pacific Railroad Co. v. United Transportation Union, 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994).............. 17

Union Pacific Railroad Co. v. United Transportation Union, 23 F.3d 1397 (8th Cir. 1994).. 18

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987)............................ 18

STATUTES AND REGULATIONS

29 U.S.C. § 101 *et seq.* 2

29 U.S.C. § 141 *et seq.* 3, 7

45 U.S.C. § 151 *et seq.* .... *passim*

45 U.S.C. § 152, First 2

45 U.S.C. § 153 .... *passim*

TABLE OF AUTHORITIES – Continued

Page

45 U.S.C. § 153, First (g) 23

45 U.S.C. § 153, First (i) 5

45 U.S.C. § 153, First (j) 15

45 U.S.C. § 153, First (l) 23

45 U.S.C. § 153, First (m) 23

45 U.S.C. § 153, First (n) 15

45 U.S.C. § 153, First (o) 23

45 U.S.C. § 153, First (p) 10

45 U.S.C. § 153, First (q) 9, 10, 13, 16

45 U.S.C. § 153, First (t) 23

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MISCELLANEOUS

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TABLE OF AUTHORITIES – Continued

Page

NRAB Instructions Sheet (July 1, 2003), *available at* www.nmb.gov/arbitration/nrab-instruc.pdf 20

BRIEF OF *AMICUS CURIAE*[1] BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, NATIONAL DIVISION, IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Brotherhood of Locomotive Engineers and Trainmen, National Division ("BLET"), is an employee association and labor union organized under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* BLET is the collective bargaining representative for its 56,000 members in the craft of locomotive engineers on all of the nation's major railroads, Amtrak and many of the regional and short line railroads. The BLET has full jurisdiction over wages and working conditions set forth in all BLET national agreements and of all questions arising thereunder. The BLET's General Committees of Adjustment, like the respondent herein, are subordinate, semi-autonomous entities within the BLET that administer the agreements in effect on their respective railroad properties and handle all disciplinary investigations and grievances of BLET members within their jurisdictions on a day-to-day basis.

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[1] Counsel of record for all parties consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members or counsel made a monetary contribution to its preparation or submission.

BLET and its predecessor, the Brotherhood of Locomotive Engineers, have existed since 1863 and participated separately, as here, or joined together with other rail unions, such as the Railway Labor Executives' Association, in the legislative process leading to the RLA in 1926, its amendments in 1934 and the 1966 amendments to Section 3 of the RLA, 45 U.S.C. § 153. BLET similarly has appeared before this Court, separately or jointly, on numerous matters important to rail labor, including arbitration issues arising out of the application of Section 3 before and after the 1966 amendments, such as *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); and *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989).

As stated often by this Court, the major purpose for the 1934 statutory scheme was the promotion of a method to effectively adjust the multitude of "minor" disputes in the railroad industry and to eliminate any cause that would give employees justifiable reason to interrupt interstate and foreign commerce, as they had the right to do at that time under the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* This purpose is stressed in Section 2, First of the RLA, 45 U.S.C. § 152, First, which imposes a duty upon carriers and their officers and upon the employees "to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." This Court on numerous occasions has recognized that duty placed upon the employees, and also the concomitant duty upon carriers. This duty represents the *quid pro quo* for rail labor's relinquishing the right to strike during the expansive open-ended term of railroad collective bargaining agreements, *i.e.*, to *adjust* their disputes over the interpretation and application of the existing agreements or, upon failure to reach an adjustment, to submit those disputes to binding arbitration on the merits. *See, e.g., Elgin, Joliet & Eastern Railway Co. v. Burley,* 325 U.S. 711, at 727-28 & n. 23, 24 (1945) ("*Burley I*").

Contrary to the inference that petitioner and its supporting *amici curiae* attempt to convey, the arbitration scheme under Section 3 only applies to railroad employers and their employees. It does not apply to airline employees. *See* Section 201 of the RLA, 45 U.S.C. § 181. Also, it does not apply to workers covered by the Labor Management Relations Act of 1947, 29 U.S.C. § 141. But in contrast to the 1934 situation when strikes over contract interpretation disputes were the norm, since 1934 virtually every dispute arising between railroads and their employees during the term of their collective bargaining agreements has become grist for the arbitration mill. *See Consolidated Rail Corp.*, 491 U.S. at 307 (an asserted contractual right renders the dispute subject to mandatory arbitration unless the claim is "frivolous or obviously insubstantial").

Contrary to the contention of the National Railway Labor Conference ("NRLC") and its fellow *amici*, sustaining the ruling below will not add undue delay to the Section 3 dispute resolution process. The number of pending arbitration cases just prior to the 1966 amendments at the end of fiscal year ("FY") 1965, (6,245), was virtually identical to the number of cases the National Mediation Board ("NMB") reports to be awaiting arbitration today (6,212). *Compare* Thirty-First Annual Report of the National Mediation Board (G.P.O. 1968) at Table 9 and National Mediation Board Annual Performance and Accountability Report FY 2008 *available at* http://www.nmb.gov/documents/nmb_ar08.pdf at 37. More cases regularly are docketed than are decided annually. *Id.* The current situation is comparable to what existed pre-1966 when the nearly identical "backlog of pending disputes [was] immense" and the National Railroad Adjustment Board ("NRAB" or "Board") did not "even come close to maintaining an equilibrium in its backlog by being able to dispose of as many cases as were docketed during the period." *See Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, *supra* at 47, n. 5 (Goldberg, J., dissenting opinion).

The facts in this case confirm that disputes presented to the NRAB are not being decided quickly so as to remove cause for job actions or labor unrest. The railroad discharged or disciplined the five locomotive engineers in 2001 and 2002, their cases were docketed in 2002 and 2003, but the NRAB did not issue its awards refusing to decide their cases until 2005. Not only does the system take inordinate periods of time to provide oral argument (for the first and only time the employee receives consideration by a non-partisan) and a merits decision, but many railroads, particularly petitioner Union Pacific, have engaged in various tactics in an effort to abolish or weaken the Section 3 process and to eliminate the use of Section 3 arbitration to "adjust" disputes and to "decide them on the merits." *See* 45 U.S.C. § 153, First (i).

Among other things, Union Pacific has attempted to delay the arbitral process by assigning too few labor relations personnel to handle claims and grievances; has refused to timely meet with the employee's representative; has in some instances insisted on party-pay boards if the organization desired expedited handling; has insisted that UP officers, rather than the regularly assigned carrier NRAB representatives, handle UP's cases before the NRAB; and then has interjected previously unraised factors, such as offsets to monetary awards, at the conclusion of the referee hearing without contractual support or evidence. For well over fifty years, railroad efforts to eliminate the benefits of the NRAB Section 3 statutory arbitration process by legislative and agency action have failed and properly so, given that the RLA is the cornerstone of the social compact in the railroad industry.

The lengthy periods that cases languish before the NRAB belies the argument of petitioner that the federal policy of settling labor disputes expeditiously by arbitration would be undermined if the simple issue in this case had been decided upon the actual evidence presented by respondent. Indeed, the federal policy would best have been served if the NRAB referee had dismissed Union Pacific's objection as untimely, coming as it did some two years after on-property handling had been completed. While Union Pacific and other rail carriers actively have sought to discourage rail employees and their representatives from relying on the NRAB, the catastrophic outcome predicted by the NRLC *amici* will not occur as long as the statutory process is maintained and the employees receive a fair determination on the merits of their claims and grievances.

Furthermore, the position of the petitioner and the railroad industry in this case would, as a practical matter, mean that railroads can effectively circumvent the duties imposed upon them by Section 2, First of the RLA. Rather than allowing grievances to be determined on their merits, as bargained for in the 1934 amendments, rail carriers could use various devices, such as deliberately withholding affirmative or alleged jurisdictional defenses as in this case until the written on-property record had been closed, in order to deny the employees oral argument or a fair hearing on the merits before the arbitration board. Such conduct severely undermines the very system created by the parties and enshrined in law by Congress to prevent interruptions to commerce. Due to the number of disputes submitted to the NRAB each year and the lack of any effective deterrent to chicanery similar to that employed by petitioner in this case, employees will be denied a determination on the merits and the risk of job actions would then multiply throughout the rail industry. In this case, BLET has a clear interest in assisting its members and other rail employees in protecting their rights under the RLA, which are distinctly different from those employees working for entities other than railroads. BLET hopes to assist the Court in upholding an important and cherished protection for rail workers, as promised in 1934, and the public's interest in the uninterrupted flow of commerce, which is jeopardized by the rail carriers' position before the Court.

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SUMMARY OF ARGUMENT

The question before the Court is a very narrow one, which pertains to only a small percentage of workers in the nation – railroad workers with claims being handled pursuant to Section 3 of the RLA. Unlike workers covered by the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, and airline employees, who by reason of 45 U.S.C. § 181 are specifically exempt from Section 3, persons working for rail carriers are subject to compulsory arbitration. The labor organizations representing railroad employees agreed to forego their otherwise available right to strike over contract interpretation disputes and to this form of arbitration, because the 1934 amendments to the RLA created and funded the NRAB and provided for a nonpartisan determination on the merits by a neutral appointed by the government and paid with federal funds. *See Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 36-39 (1957).

In 1966, Section 3 of the Act was amended to include a subparagraph (q), which permitted any party aggrieved by a NRAB award to have it reviewed on three grounds. Those grounds are failure of the board to comply with the requirements of the Act, failure of the order to conform or confine itself to matters within the scope of the board's jurisdiction, and fraud or corruption by a member of the board making the order.

Consistently, this arbitration scheme was found to require, at a minimum, notice of oral argument before the board, an opportunity to be heard, and a determination on the merits. These requirements may be considered the core requirements of Section 3. They are referred to in the legislative history and decisions of this Court and have been applied in various cases as the requirements that must not be violated by Section 3 arbitration boards.

In this case, involving the dismissal or disciplining of five locomotive engineers, the railroad's partisan board member, immediately prior to the scheduled oral hearing before the board and more than two years after submissions had been filed, requested the board dismiss the claims because employees' submissions did not state that the claims had been conferenced. The employees' representative affirmed that the cases had been discussed in conferences between the railroad and the union and offered to present evidence of the conferences. The neutral referee gave him the opportunity to present that evidence at a later date. When that day came, however, the referee reversed himself, refused to accept the proffered evidence and authored awards dismissing the claims without addressing their merits, which dismissal was joined by the petitioner's officer who had belatedly raised the issue and sat as a member of the board.

Respondent filed a petition to review under Section 3, First (q), 45 U.S.C. § 153, First (q), seeking to vacate the awards on several grounds, including failure of the board to comply with the requirements of the RLA and due process. The district court dismissed for failure to state a claim for which relief could be granted. On appeal, the Seventh Circuit reinstated the petition and held, among other things, that the board had violated due process in dismissing the complaints without taking evidence, particularly since the railroad did not deny that conferencing had taken place. Petitioner requests the Court hold that constitutional due process does not apply to any decision of any labor arbitration and, therefore, the decision below should be reversed. However, the decision of the Seventh Circuit can be affirmed based upon the board's failure to enter a decision on the merits, a requirement of the Act, or upon statutory, in addition to Fifth Amendment, due process. As we also show, the writ of certiorari could be dismissed as improvidently granted. Accordingly the Court need not reach and decide the Constitutional issue that the carriers claim needs to be decided.

Although the Court decides constitutional issues only when a case cannot be decided on other grounds, BLET supports the proposition that the decision below also is sustainable on constitutional due process if necessary. Contrary to the implication of petitioner, this Court did not hold in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), that a decision of the NRAB could not be vacated for failure to grant the aggrieved party due process. But even those federal circuit courts of appeal that do not recognize due process as a permissible challenge consider the three grounds for review set forth in Section 3, First (p), 45 U.S.C. § 153, and (q) as establishing core due process rights, such as the right of notice and participation in the board's proceedings. Thus, due process issues are regularly decided under the rubric of the three statutory grounds.

The *amici* rail and aviation associations exaggerate considerably the effect of recognizing constitutional review of NRAB decisions. From the thousands of RLA adjustment board decisions rendered since 1966, there have been fewer than two dozen reported due process challenges, and less than a handful have succeeded. Furthermore, virtually all have come in the context of a board's treatment of an individual's claim. These are hardly "*destabilizing* minor disputes." NRLC Brief at 5 (emphasis supplied). The industry points to none that has threatened an interruption to commerce, which is precisely the destabilization RLA Section 3 is intended to prevent. On the other hand, the Court's purpose in *Sheehan* was to ensure that the resolution of minor disputes not be taken away from the NRAB and placed in the courts. Due process review is not inconsistent with that purpose. Upon a finding that due process is violated, a federal court's appropriate response is to remand the dispute to the NRAB to correct the defect and resolve the matter on its merits. The rulings of those courts that recognize due process review and which have found violations have done just that. *See, e.g., Hall v. Eastern Airlines,* 511 F.2d 663 (5th Cir. 1975); *Hornsby v. Dobard*, 291 F.2d 483 (5th Cir. 1961). Those few district courts that injected themselves into the merits of the particular contract dispute that brought the parties to the Board in the first place were reversed on appeal, as happened in *Sheehan*.

Even considering all of this, only a very small group of workers is subject to the NRAB's jurisdiction, process and procedures. The situation before the Court is a unique one involving a few employees; there is little likelihood that it will happen again. Pet. App. 22a ("This case presented a unique situation which we doubt will come before a court again. . . ."). Since the case can be disposed of on non-constitutional grounds, the decision below should be affirmed or alternatively the writ of certiorari should be dismissed as improvidently granted.

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ARGUMENT

I. THE DECISION BELOW SHOULD BE AFFIRMED ON THE GROUND THAT THE BOARD VIOLATED THE REQUIREMENT OF THE RAILWAY LABOR ACT THAT THE RAILROAD EMPLOYEE BE RENDERED AN AWARD ON THE MERITS.

Amicus BLET agrees with the position taken by the *amicus curiae* American Federation of Labor – Congress of Industrial Organizations that the decision of the Court of Appeals for the Seventh Circuit should be affirmed on the ground that the dismissals of the five claims by the NRAB's First Division, the exclusive NRAB forum for adjusting minor disputes involving train and engine service employees, failed to comply with the requirements of the RLA. To the extent that requirement is a substantive one for rail employees subject to and invoking Section 3 arbitration, however, BLET submits that it does not reach any needed discussion of statutory or constitutional due process. In fact, the factual situation presented here is a unique case that should never have arisen and in all likelihood will never arise again and, therefore, is not an appropriate vehicle for deciding the issue that petitioner Union Pacific and the NRLC *amici curiae* attempt to conjure from the court of appeals ruling.

A great deal of time and paper have been consumed in this case on stressing that there are only three grounds for review and that those grounds are "the narrowest known in the law." *See* Pet. Brief at 14, 25, 53; NRLC Brief at 12. Those specific reasons are: (1) "failure of the division to comply with the requirements of this chapter," (2) "failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction," and (3) "fraud or corruption by a member of the division making the order." *See* 45 U.S.C. § 153, First (q); *also see Sheehan*, *supra*, at 94. However, overlooked is the breadth of the ground that the arbitration proceedings must conform to the requirements of the RLA.

According to Petitioner (Brief at 34), the RLA has but three requirements the NRAB must follow:

> "[p]arties may be heard either in person, by counsel, or by representatives, as they respectively elect"; ensure[ ] an equal number of labor and management representatives, with ties to be broken by a neutral referee; and direct[ ] that . . . "[a] copy of the awards shall be furnished to the respective parties." *See* 45 U.S.C. §153, First (a), (j), (l), (m). The RLA thus provides the core due process requirements of notice, an opportunity to be heard, and a neutral decisionmaker.

But neither this Court nor any appellate court has read the requirements of the RLA as narrowly as petitioner contends.

"Rights of notice, hearing and participation or representation are given." *See Burley I* at 727. These rights always existed under the voluntary arbitration scheme before 1934 and continue to be recognized by the Act. 45 U.S.C. § 153, Second. By 1934, however, there were thousands of undecided grievances, and the employees could strike over them in various contexts. Thus, the National Railroad "Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision." *Id.*, 727-28 (footnote omitted). The employees and their organizations gave up the right to strike in consideration of a government sponsored and paid National Railroad Adjustment Board, which would resolve grievances on the merits with the involvement of a federally-paid neutral referee when the parties could not resolve them on their own. The testimony in this regard of Mr. George Harrison, head of the Railway Labor Executives' Association, before the Senate Interstate Commerce Committee has often been relied on by this Court:

> *These railway labor organizations have always opposed compulsory determination of their controversies.* We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and * * * *we are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make,*

> * * * if we are going to get a hodgepodge arrangement by law, then we don't want to give up that right because we feel that we will get a measure of justice by this machinery that we suggest here.

Burley I at n. 24 (emphasis in original); *see also Union Pacific R. Co. v. Price*, 360 U.S. 601, 613 (1959); *Brotherhood of R.R. Trainmen v. Chi. River and Indiana R. Co.*, 353 U.S. 30, 38-39 (1957). That this determination must be on the merits of a grievance to give finality to a NRAB award was further underscored in *Gunther v. San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, 264 (1965).

Similarly, the Sixth Circuit, one of the lower courts that rejects due process as a ground for review of a RLA arbitration award, in *Jones v. St. Louis – San Francisco Railway Co.*, 728 F.2d 257 (6th Cir. 1984), set aside an award on the basis that the award violated a requirement of the RLA when two of the members of the board making the decision had replaced the members who had heard the case. The decision was based upon the finding that Section 3, First (j) and (n), 45 U.S.C. § 153, First (j), (n), entitle the parties to be heard by a board and that board's members "must hear the parties and participate in the decision-making process before rendering an award." *Id.*, at 262. That situation is no different than the instant matter where the neutral member refused to hear the merits of the case. Stating the standard somewhat differently in *Kinross v. Utah Railway Co.*, 362 F.3d 658, 662 n. 3 (10th Cir. 2004), the Tenth

Circuit, which also has rejected the due process ground of review, said relative to Section 3, First (q), "Congress allowed for review of the Board's failure to comply with the requirements of the Railway Labor Act, including procedural requirements ensuring claimants an opportunity to present evidence and argue their case." Citing this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), the court emphasized that "a tribunal must ensure 'an opportunity to be heard at a meaningful time and in a meaningful manner,'" which is encompassed within the three grounds set forth in the Act. *Id.* Here, the Board violated the RLA's requirement by dismissing the claims solely on the oral statement of Union Pacific's board member in an executive session. That extra-record statement was contrary to the documentary evidence the referee permitted the employees' representative to produce and then refused to consider or place in the record. One inference that may be drawn from this sequence is that the railroad's representative on the board had somehow persuaded the referee that the employees' representative would be unable to produce evidence of conferencing and was forced to concoct a different, "technical" ground when the evidence was produced and it proved that conferencing had in fact occurred.

In any event, simply dismissing the employees' cases without consideration of any facts and evidence violates one of the four fundamental requisites of the RLA: a resolution of the minor dispute upon the merits. That requisite was not fulfilled in this case.

The judgment of the court of appeals should be affirmed.

II. WHETHER STATED IN TERMS OF DUE PROCESS, PUBLIC POLICY OR OTHER NON-STATUTORY GROUNDS, RAILROAD LABOR ARBITRATION AWARDS ARE OFTEN CHALLENGED AND REVIEWED ON BASES OTHER THAN THOSE SPECIFICALLY LISTED IN SECTION 3 OF THE ACT.

Although BLET submits that the decision below fully conforms to review under Section 3 of the RLA and, therefore, is not dependent on the viability of Constitutional due process for affirmance, it is significant to note that railroad arbitration awards have been and continue to be challenged on various non-statutory grounds. *See, e.g., The Railway Labor Act* (Michael E. Abram, *et al.*, eds., ABA Section of Labor and Employment Law (2d ed. 2005), at 432-37. One non-statutory challenge that is a particular favorite of the petitioner is public policy. In *Union Pacific Railroad Co. v. United Transportation Union,* 3 F.3d 255 (8th Cir. 1993), *cert. denied*, 510 U.S. 1072 (1994), the Railroad successfully petitioned the district court to review a Section 3 arbitration award reinstating an employee, who had been found to have used drugs, on the basis that the award violated public policy against drug use by persons working in safety sensitive jobs. The Court of Appeals for the Eighth Circuit agreed. A similar situation arose before the same court in *Union Pacific Railroad Company v. United Transportation Union*, 23 F.3d 1397 (1994). In that case, however, the district court concluded that it lacked jurisdiction to review the award on public policy grounds. Nevertheless, and notwithstanding this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the appellate court reversed and remanded the case for further proceedings so the district court could engage in non-statutory public policy review.

The professed fidelity of some of the railroad *amici* to the narrowest possible reading of Section 3 First (q)'s statutory bases for judicial review also is of recent vintage, as they, too, have launched non-statutory public policy challenges to RLA arbitration awards. *See, e.g., Atchison, Topeka and Santa Fe Railway Co. v. United Transportation Union,* 3 F.3d 355 (5th Cir. 1999) (district court denial of public policy challenge affirmed); *BNSF Railway Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 524 F.Supp.2d 818 (N.D.Tex. 2007) (vacating NRAB award on public policy grounds).

Unlike due process review, public policy challenges by employers have become commonplace, even though that doctrine was narrowed by the Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers,* 531 U.S. 57 (2000). Due to the broad sweep and nebulous nature of the term "public policy," this exception to the three listed grounds for review in the Act would just as easily encompass the term "due process" as argued by the respondent and found to have been violated by the Seventh Circuit when it considered the matter below. Accordingly, we submit that the rationale for allowing public policy review applies equally to considering whether an employee's fundamental right to receive a fair hearing before the NRAB is implicated, and on that basis, too, the decision below should be affirmed.

III. BECAUSE THIS IS A SIMPLE CASE THAT HAS NOT FREQUENTLY OCCURRED, PRESENTS A SIMPLE QUESTION NOT REQUIRING A CONSTITUTIONAL ANSWER, AND IS UNLIKELY TO REOCCUR, THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

As shown by the NRLC (Brief 6, n. 3), arbitration is sought in over 6,000 new railroad minor disputes annually. Contrary to the shrill outcry from the NRLC *amici*[2] about due process challenges dominating railroad labor arbitrations, there are very few reported cases asserting due process violations over the past decade. *See The Railway Labor Act* at 433-34, as supplemented in 2009 at 115-17. In fact, the present challenge arose because Union Pacific sat on its hands for over two years and then sandbagged the employees' representative on the day of the oral argument. If the respondent had merely stated in its submission, "All on-property appeals have taken place and the claim has been conferenced," the referee would have been forced to reject the railroad's untimely argument.

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[2] In fact, the NRLC *amici* urge the Court to engage in judicial activism by arguing that the "questions presented in this case should not be considered solely in the narrow context of the particular facts of the current dispute." NRLC Brief at 4.

The record indicates that the referee looked at NRAB Rules from 1934 and a few decisions from divisions other than the First Division, and then decided that he was required to dismiss the claims because the written submissions before him were silent on whether they had been conferenced. In handling the matter this way, however, the referee overlooked the NRAB's own Instructions Sheet in which parties are encouraged to refrain from proving conferencing if the issue is not in dispute. NRAB Instructions Sheet (July 1, 2003), *available at* www.nmb.gov/arbitration/nrab-instruc.pdf, p. 5 ("Representatives may wish to omit documents that are unimportant and/or irrelevant to the disposition of their dispute; for example, letters granting time limit extension (assuming time limits are not an issue in the dispute), letters requesting a conference (assuming that is not an issue in the dispute)."). If inclusion of proof of conferencing in a written submission were jurisdictional, as the referee found here, the NRAB hardly would be advising the parties that they may freely dispense with it.

In sum, this case presents a highly unusual situation that never before occurred before the First Division of the NRAB; it has not happened since these cases were before the Division in 2005 and should not happen in the future.[3] Moreover, if the employees' due process claim is treated, as we suggest it should be, as a "denial of a right guaranteed in Section 3 of the RLA" and "a failure of a Board to comply with the Act," as such challenges are or should be classified judicially, there would be no expansion of "judicial review of RLA awards," contrary to the claims by some. *The Railway Labor Act* at 433-34. In this way, most due process violations can be addressed without requiring Constitutional analysis.

Once the petitioner's improper and unjustified characterization of this case, as only one of a veritable multitude that raise Constitutional due process issues, is removed and the case is correctly viewed as concerning simply whether the employees were denied a right already contained in the RLA, it is clear that this case is not the appropriate vehicle for the broad ruling sought by petitioner and its supporting *amici*, many of whom are not even eligible to participate in NRAB proceedings.

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[3] As a result of this case, BLET has instructed its subordinate bodies, out of an abundance of caution, to affirm in all their submissions that all appeals and conferencing have been held. We are unaware of any railroad raising a conference-based challenge since that time.

IV. SHOULD THE COURT REACH THE CONSTITUTIONAL QUESTION, IT SHOULD AFFIRM THE SEVENTH CIRCUIT'S RULING THAT THE EMPLOYEES WERE DENIED DUE PROCESS.

BLET was one of the national labor organizations involved in the legislative process when the NRAB was created in 1934. As explained by this Court on numerous occasions, before the creation of the Board, the railroad industry faced a plethora of unresolved contract interpretation disputes that frequently boiled over into strikes that interrupted the flow of interstate commerce, a consequence that Congress deemed inimical to the public interest. The Board was created as part of a legislative response to this national problem. Congress's solution was to eliminate the right to strike over such disputes in exchange for the creation of a mandatory minor dispute resolution process. Section 3, First of the Act is "the source of the power and authority by which any private rights are lost or sacrificed." *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 (1956). The enactment of Section 3, First authorizing the NRAB to resolve contract disputes, and requiring that such disputes be presented to that Board in the absence of voluntary agreement to do otherwise, "is the governmental action on which the Constitution operates." *Id.*

The NRAB is embodied in a federal entity, housed in government offices, staffed by government employees, assisted by government selected and paid referees, empowered to promulgate binding rules that have been embodied in the Code of Federal Regulations, and imbued with the authority to render final and binding decisions with compulsive orders to resolve those minor disputes in order to keep interstate rail traffic flowing freely. *See* 45 U.S.C. § 153, First, (g) and (l) (referee selection and payments); (m) (binding nature of awards); (o) (orders of compliance); (t) (federal offices); (u) (federally-paid employees); (v) (rulemaking); and (w) (accounting and reporting); *see also* www.nmb.gov/arbitration. The actions of the Board plainly are governmental actions for constitutional purposes.[4] To paraphrase Justice Clark in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), "The State has so far insinuated itself into [the resolution of "minor disputes"] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the [Fifth] Amendment."

Here the employees represented by the respondent General Committee were deprived of the opportunity to obtain a ruling on the merits of their claims that they had been wrongly dismissed or disciplined by the railroad due to the interjection *sua sponte* by a Carrier partisan member of the Board of a possible procedural misstep on the Committee's part, something the Union Pacific itself had never raised. When confronted with the Carrier Board member's suggestion that a pre-arbitration conference requirement may not have been satisfied, the Committee orally stated that it had. Then, with the blessing of the referee, the Committee presented documentary evidence to support its position that every procedural requirement had been satisfied. Startlingly, when confronted with the proof, the referee refused to consider it and, joined by the Carrier partisan on the Board, dismissed the cases as procedurally defective – not because conferences had not been proven, but because the proof had not been included in the written submissions, even though there was no reason to include it in the submissions because the fact of conferencing had never been in dispute. A starker denial of the fundamental right to a hearing on the merits can hardly be imagined.

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[4] Indeed, Petitioner concedes that "state action technically exists in this setting." *See* Pet. Brief at 31.

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CONCLUSION

For the reasons stated above, the *amicus curiae* respectfully requests that the court dismiss the writ of certiorari as improvidently granted, or in the alternative hold that the ruling below should be affirmed.

Respectfully submitted,

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August 14, 2009

AMICUS
CURIAE
BRIEF

FILED
JUN 2 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-604

In the Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ... iii

STATEMENT OF INTEREST ... 1

SUMMARY OF THE ARGUMENT ... 4

ARGUMENT ... 6

- I. THE RLA REFLECTS A STRONG LABOR POLICY FAVORING ARBITRATION, AND FINALITY OF ARBITRATION AWARDS IS AN INTEGRAL ASPECT OF THAT POLICY ... 6
  - A. The Public Policy Favoring Final and Binding Arbitration Is Reflected Not Only in the Language of the Statute, But Also Through the Legislative History of the Act ... 7
  - B. *Sheehan* Recognizes that Finality Is Essential to the Proper Functioning of the Adjustment Board Process ... 11
  - C. RLA Adjustment Boards Have Special Industry Expertise and Are Intimately Familiar with the Practices and Procedures That Have Developed Through Decades of Experience ... 13
- II. THE RLA IS IN HARMONY WITH THE GENERAL FEDERAL POLICY FAVORING FINAL AND BINDING ARBITRATION ... 17

TABLE OF CONTENTS—Continued

Page

III. PROCEDURAL AND EVIDENTIARY ISSUES DECIDED BY ADJUSTMENT BOARDS ARE NOT APPROPRIATE SUBJECTS FOR COLLATERAL DUE PROCESS REVIEW 20

- A. Congress Rejected Judicial Review on Extra-Statutory Due Process Grounds 20
- B. Procedural Issues, Even Those Affecting Arbitrability, Are Within the Particular Expertise of the Arbitrators 23

IV. THE NRAB'S DECISION IN THIS PROCEEDING WAS A RUN-OF-THE-MILL PROCEDURAL RULING THAT DOES NOT OFFEND PRINCIPLES OF DUE PROCESS 25

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES Page

14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) 19

Anderson v. National Railroad Passenger Corp., 754 F.2d 202 (7th Cir. 1984) 24

Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co., 373 U.S. 33 (1963) 23

Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U.S. 30 (1957) 8, 9

Brown v. Pro-Football, Inc., 518 U.S. 231 (1996) 2

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) 25

Consolidated Rail Corp v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) 2, 4, 5

Eastern Associated Coal Corp. v. United Mine Workers, District 17, 531 U.S. 57 (2000) 3

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1945) 7, 8, 9

Gunther v. San Diego & Arizona Eastern Railway Co., 382 U.S. 257 (1965) 15

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) 23

International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 10, 11

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 15, 23, 24

TABLE OF AUTHORITIES—Continued

Page

Jones v. Seaboard System Railroad, 783 F.2d 639 (6th Cir. 1986) 14

Kinross v. Utah Railway Co., 362 F.3d 658 (10th Cir. 2004) 23

Kotakis v. Elgin, Joliet & Eastern Railway, 520 F.2d 570 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975) 24

Morrissey v. Brewer, 408 U.S. 471 (1972) 25

Norfolk Southern Railway Co. v. Kirby, 543 U.S. 14 (2004) 3

Norfolk Southern Railway Co. v. Shanklin, 529 U.S. 344 (2000) 3

Norfolk & Western Railway Co. v. Ayers, 538 U.S. 135 (2003) 3

Northwest Airlines, Inc. v. Air Line Pilots Association, 486 U.S. 1014 (1988) 3

Pokuta v. Trans World Airlines, Inc., 191 F.3d 834 (7th Cir. 1999) 24

Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239 (1950) 7, 8, 15

Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989) 3

US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) 3

Union Pacific Railroad Co. v. Price, 360 U.S. 601 (1959) 10, 12, 20, 21, 23

Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978) 11, 12, 22

Page

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987) 19

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 18, 19

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 18

FEDERAL STATUTES AND REGULATIONS

45 U.S.C. § 151a 4

45 U.S.C. § 152 Second 8, 9

45 U.S.C. § 153 First 5
45 U.S.C. § 153 First (h) 14, 15
45 U.S.C. § 153 First (i) 9, 23
45 U.S.C. § 153 First (j) 23
45 U.S.C. § 153 First (*l*) 9, 13
45 U.S.C. § 153 First (m) 7
45 U.S.C. § 153 First (n) 9
45 U.S.C. § 153 First (q) 12
45 U.S.C. § 153 Second 7, 16, 17

45 U.S.C. § 184 10

45 U.S.C. § 185 10

29 C.F.R. § 301.4(a) 14
29 C.F.R. § 301.4(b) 14
29 C.F.R. § 301.4(c) 14, 15
29 C.F.R. § 301.4(d) 14, 15

29 C.F.R. § 301.5 26

29 C.F.R. § 301.7(a) 26

Page

H.R. Rep. No. 73-1944 (1934)........................ 9

H.R. Rep. No. 89-1114 (1965)........................ 21

Pub. L. No. 73-442, 48 Stat. 1185 (1934)..... 12

Pub. L. No. 89-456, 80 Stat. 208 (1966)....... 16

MISCELLANEOUS

Alvin L. Goldman, *Selecting the Correct Standard for Judicial Review of Airline Grievance Arbitration Decisions*, 9 U. Pa. J. Lab. & Emp. L. 743 (2007)............. 22

Benjamin Aaron et al., *The Railway Labor Act at Fifty* (1977)..................................... 16

Cleared for Takeoff (McKelvey ed. 1988)..... 6, 7

Dana Eischen & Mark Kahn, *Grievance Handling and Arbitration in the Airlines: Can they be Improved*, in *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads, Society of Professionals in Dispute Resolution* (1990)..................... 6

H. D. Wolf, *The Railroad Labor Board* (1927)... 13

John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* (1981)............................. 16

Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567 (1937).. 14, 27

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TABLE OF AUTHORITIES—Continued

	Page
National Railroad Adjustment Board, *Uniform Rules of Procedure* (Revised June 23, 2003)	26
P. Harvey Middleton, *Railways and Organized Labor* (1941)	13, 14
The Railway Labor Act (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005)	10, 16, 17
Thomas J. Brewer & Lawrence R. Mills, *When Arbitrators "Exceed Their Powers,"* Disp. Resol. J., Feb./Apr. 2009	25

In the Supreme Court of the United States

No. 08-604

UNION PACIFIC RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN GENERAL COMMITTEE OF ADJUSTMENT, CENTRAL REGION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL RAILWAY LABOR CONFERENCE, ASSOCIATION OF AMERICAN RAILROADS, AND AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST [1]

The *amici* filed a brief in support of certiorari in this case, and now file the attached brief to address the merits of the important questions presented. The resolution of these questions will affect not only the parties, but the entire railroad and airline industries in the United States – the two industries whose labor relations are regulated by the Railway Labor Act ("RLA" or "Act"). The *amici* represent the collective views of the Nation's major rail and air carriers, and their members have a strong interest in protecting the efficacy of the Act's compulsory framework for the resolution of labor disputes, and hence the stability of labor relations in industries that Congress has deemed critical to the national economy. Pursuant to Supreme Court Rule 37.3(a), the *amici* file this brief with consent from the Respondent, Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region, and the Petitioner, Union Pacific Railroad Company. Letters of consent have been lodged with the Clerk of the Court.

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[1] Counsel of record for all parties consented to the filing of this *amici curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The National Railway Labor Conference ("NLRC") is an unincorporated association whose membership includes all of the Class I freight railroads in the United States and many smaller lines. The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining under the RLA. It also represents the industry on labor-related issues (including matters related to grievance handling and arbitration) before congressional committees, executive branch agencies, and the courts. The NRLC has filed briefs as *amicus curiae* in numerous cases before this Court, including *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996), and *Conrail v. RLEA*, 491 U.S. 299 (1989).

The Association of American Railroads ("AAR") is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 92 percent of the workers, and account for 94 percent of the freight revenue of all railroads in the United States. Members also include passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR represents its members in connection with a wide variety of administrative, legislative, and judicial matters. AAR has submitted *amicus* briefs in this Court in numerous cases, including *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000).

The Airline Industrial Relations Conference ("AIRCON") was formed in 1971 as a voluntary association of various passenger and air cargo carriers. AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial, and administrative matters. AIRCON has submitted *amicus* briefs in this Court in numerous cases, including *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000), *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988).

Because the *amici* represent virtually all of the major rail and air carriers covered by the Railway Labor Act, the views expressed in this brief will assist the Court in understanding the scope and impact of the issues presented by this case. The court below has inappropriately expanded the bases for judicial review of arbitration awards under the Railway Labor Act, thereby threatening to undermine the finality of the arbitral process for resolving employee grievances. This presents a great concern to the *amici*. The *amici* therefore urge the Court to reverse the Seventh Circuit's decision.

SUMMARY OF THE ARGUMENT

The questions presented in this case should not be considered solely in the narrow context of the particular facts of the current dispute. Rather, the Court should analyze these questions against the background of the overriding goal, clearly expressed by Congress in the Railway Labor Act ("RLA" or "Act"), of achieving the prompt and orderly resolution of labor disputes in the airline and railroad industries, and thereby avoiding strikes and other interruptions to commerce. 45 U.S.C. § 151a (2006).

This statutory goal depends in large part on the finality that attends the Act's procedures for resolving the many thousands of grievances that arise in the airline and railroad industries each year. The various boards of adjustment provided for in the RLA are established and administered by labor and management as an adjunct to the collective bargaining process in order to resolve "minor disputes" concerning the interpretation or application of the parties' agreements.[2] Awards are made by the partisan members of the board who are selected by the parties, together with a neutral arbitrator who breaks deadlocks. The award is thus crafted by the advocates and their board members who are familiar with the parties' agreement and experienced in resolving labor disputes in the airline and railroad industries.

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[2] The distinction between "major disputes" and "minor disputes" under the RLA is that major disputes involve the formation of collective bargaining agreements, whereas minor disputes involve grievances or other disputes concerning the interpretation of an existing collective bargaining agreement. *See Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299,

The decision below is inconsistent with the language, structure, and purpose of the RLA because it undermines the practical finality of adjustment board awards by expanding the bases for judicial review and prolonging the resolution of destabilizing minor disputes. Furthermore, the decision below is inconsistent with the broader federal policy favoring final and binding arbitration of all disputes subject to statutory or contractual arbitration provisions. Procedural issues necessarily arise in these disputes, but there is no cause for courts to apply stricter scrutiny to an arbitrator's resolution of procedural issues than to the merits of the award itself. Indeed, it is often difficult, if not impossible, to separate an arbitrator's decision on procedural issues from the arbitrator's award on the merits of the case.

"Due process" challenges to arbitration awards under the RLA invite legal complexity and protracted litigation into a process that is, by congressional design, intended to be efficient, practical, and sensitive to the peculiar customs and practices of the airline and railroad industries. Congress included procedural safeguards in the arbitral process set forth in Section 3 First of the RLA, 45 U.S.C. § 153 First, and specified the narrow grounds upon which an arbitration award may be challenged. Superim-

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302 (1989) ("[M]ajor disputes seek to create contractual rights, minor disputes to enforce them.").

posing an additional, non-statutory basis for due process review, as in the court below, interferes with this congressional design. Accordingly, the *amici* urge the Court to reverse the Seventh Circuit's decision and hold that the finality of an adjustment board award may not be challenged on independent due process grounds, or, in any event, on the procedural grounds relied upon by the court below.

ARGUMENT

I. THE RLA REFLECTS A STRONG LABOR POLICY FAVORING ARBITRATION, AND FINALITY OF ARBITRATION AWARDS IS AN INTEGRAL ASPECT OF THAT POLICY.

Stability of labor-management relations in the airline and railroad industries is achieved, on a day-to-day basis, through final and binding arbitration pursuant to the Railway Labor Act. Thousands of cases are submitted for arbitration each year in the railroad industry, and many more are arbitrated in the airline industry.[3] The particular forum for arbitration may vary depending on the industry and type of case, but the common feature in every case is that the decision of the board is to be treated as final and binding. 45 U.S.C. § 153 First (m) (awards of the National Railroad Adjustment Board "shall be final and binding"); § 153 Second (awards of system, group, or regional boards "shall be final and binding").

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[3] The National Mediation Board reported that it received 6,056 new arbitration cases in the railroad industry during fiscal year 2008. *See* National Mediation Board, *Annual Performance and Accountability Report* 71 (2008). In the airline industry, the number of arbitration cases is not publicly reported, but in the last reported study it was estimated that more than 15,000 grievances were filed during 1988 and about 50% were expected to progress to arbitration. It was also estimated that 8,000 cases were decided by airline system boards of adjustment in 1988. *See* Dana Eischen & Mark Kahn, *Grievance Handling and Arbitration in the Airlines: Can they be Improved*, in *Labor and Employment Dispute Resolution Under the Railway Labor Act: Airlines and Railroads, Society of Professionals in Dispute Resolution* 49-50 (1990). *See generally*

A. The Public Policy Favoring Final and Binding Arbitration Is Reflected Not Only in the Language of the Statute, But Also Through the Legislative History of the Act.

The statutory requirement of final and binding arbitration under the RLA evolved out of necessity and is the product of the parties' experience under prior legislation. Under the original version of the RLA as enacted in 1926, Congress intended that so-called "minor disputes" (*i.e.*, disputes concerning the interpretation or application of existing collective bargaining agreements) would be resolved through arbitration. It was left to the parties to voluntarily establish the arbitration boards. *See Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 242 (1950). As this Court has recounted, that original system of voluntary arbitration proved to be unworkable and failed to achieve the stability of labor relations that Congress had intended:

> The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Sev-

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Cleared for Takeoff (McKelvey ed. 1988) (citing Part 6, Handling of Minor Disputes).

> eral organizations took strike ballots and thus threatened to interrupt traffic . . . .

Elgin, Joliet & E. Ry. Co. v. Burley, 325 U.S. 711, 726 (1945).

In 1934, Congress determined that it was necessary to amend the Act in order to provide for compulsory arbitration through a National Railroad Adjustment Board ("NRAB"). *See Slocum*, 339 U.S. at 243; *Burley*, 325 U.S. at 726. Although the unions were reluctant to abandon their asserted right to strike over unresolved minor disputes, they supported the system of compulsory and final arbitration in the 1934 amendments. *See Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 37-39 (1957). The chief spokesman for the railway labor organizations testified that "we are willing to take our chances with this national board because we believe, out of our experience, that the national board is the best and most efficient method of getting a determination of these many controversies . . . ." *Id.* at 38 (quoting *Hearings Before S. Comm. on Interstate Commerce on S.3266*, 73d Cong. 33, 35 (1934)).

The 1934 amendments did not, however, dispense with the process of direct negotiations (*i.e.*, "conferencing") between the parties as a means of resolving minor disputes. *See Burley*, 325 U.S. at 728 ("The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme."). Accordingly, the Act provides that a dispute may be submitted to the NRAB only after the parties have failed to resolve it through conferencing. Section 2 Second provides that "[a]ll disputes . . . shall be considered, and, if possible, decided, with all expedition, *in conference* between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. § 152 Second (emphasis added). Further, Section 3 First (i) provides that grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred . . . to the appropriate division of the Adjustment Board . . . ." 45 U.S.C. § 153 First (i); *see also Burley*, 325 U.S. at 727 n.23 (noting that Section 3 First (i) "expressly conditions the right to move from negotiation into proceedings before the Adjustment Board upon 'failing to reach an adjustment in this manner,' i.e., by negotiation").

The possibility of a negotiated compromise continues even after the dispute has been submitted to the NRAB. The NRAB consists of partisan representatives of both labor and management, who attempt to resolve the dispute and may issue an award by agreement or majority vote. 45 U.S.C. § 153 First (n). In the event of a deadlock among the partisan members of the Board, a neutral "referee" is appointed to render an award. 45 U.S.C. § 153 First (*l*).

This power to appoint a neutral referee to break deadlocks was a critical improvement over the pre-1934 Act. *See Chicago River*, 353 U.S. at 35-36 ("Many thousands of these (minor) disputes have been considered by boards established under the [1926] Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked." (quoting H.R. Rep. No. 73-1944, at 3 (1934))). As this Court has found, the legislative history of the 1934 amendments shows that all parties understood that the award of the neutral referee would be treated as final and binding:

> The employees' representatives made it clear that, if such a statutory scheme were provided, the employees would accept the awards as to disputes processed through the scheme as *final settlements of those disputes which were not to be raised again*.

Union Pac. R.R. Co. v. Price, 360 U.S. 601, 614 (1959) (emphasis added).

When the RLA was extended to the airline industry in 1936, Congress replicated this arbitral framework for the resolution of minor disputes, but it did not create a single, national board like the NRAB. Instead, Congress obligated the parties to create boards of adjustment on an individual carrier (*i.e.*, "system") basis or on a group or regional basis and decide disputes in the "usual manner," as provided in Section 3 First (i). 45 U.S.C. § 184. *See also Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 686 (1963). In the event it became necessary to create a national adjustment board in the airline industry, Congress authorized the National Mediation Board ("NMB") to establish a National Air Transport Adjustment Board that would have the same structure and power as the NRAB. 45 U.S.C. § 185. To date, the NMB has not exercised its authority to create such a board, so minor disputes in the airline industry continue to be resolved through system boards that are typically established on an individual carrier and union basis. *See The Railway Labor Act* 416-17 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

Although the forum for arbitration of minor disputes may be somewhat different in the airline industry, this Court has held that the principle of finality is a constant and essential element of the congressional design:

> There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions.

Central Airlines, 372 U.S. at 695. Were it otherwise, unresolved minor disputes would threaten the stability of labor relations in the airline industry, just as they did in the railroad industry prior to 1934. *See id.* at 694-95 (holding that the finality to be accorded to airline system board awards should be "judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme"). Accordingly, the law regarding the finality of adjustment board awards should be developed with due regard for the impact of that law on both industries that are regulated by the RLA.

B. *Sheehan* Recognizes that Finality Is Essential to the Proper Functioning of the Adjustment Board Process.

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court recognized that, under the Act, awards of an adjustment board are to be treated as final and judicial review is to be extraordinarily limited. Until 1966, the Act did not contain any explicit provision for judicial review of an adjustment board award except for collateral review in the context of a petition to enforce a monetary award under Section 3 First (p). *See* Pub. L. No. 73-442, 48 Stat. 1185, 1191-92 (1934); *Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 614-16 (1959). The 1966 amendments removed the provision that allowed carriers to collaterally attack monetary awards and permitted both sides to seek judicial review of an award. However, such review was extremely narrow. Congress specified only three limited bases for review in Section 3 First (q): (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine itself, to matters within the scope of its jurisdiction; and (3) fraud or corruption by a Board member. 45 U.S.C. § 153 First (q).

In *Sheehan*, this Court held that these three bases for judicial review must be narrowly construed because "[t]he effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations." *Sheehan*, 439 U.S. at 94. If the parties were permitted more leeway to challenge adjustment board awards in federal court, minor disputes would continue to fester, as they did prior to the 1934 amendments. Congress clearly sought to avoid such an outcome in the RLA. Therefore, *Sheehan* wisely recognizes that in order to serve the fundamental purpose of the Act – promoting stable labor relations in the airline and railroad industries – it is "essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Id.*

C. RLA Adjustment Boards Have Special Industry Expertise and Are Intimately Familiar with the Practices and Procedures That Have Developed Through Decades of Experience.

The various adjustment boards that exist in the airline and railroad industries are uniquely qualified to resolve the multitude of labor disputes that arise on a daily basis in these industries. They are not detached outsiders who decide grievances with an eye only on the facts and circumstances of the particular case. Rather, they are typically longstanding, bipartisan boards composed of experienced representatives of management and labor who are intimately familiar with the parties' written and unwritten customs, practices, and precedents. As the RLA provides, these bipartisan boards seek the opinion of a neutral when they are not able to reach a decision themselves. *See* 45 U.S.C. § 153 First (*l*). The neutral member is drawn from a limited roster of arbitrators who generally have years of experience with the parties and are likewise familiar with their customs, practices, and precedents. *See* National Mediation Board, *Annual Performance and Accountability Report* 65-66 (2008) (listing the current partisan members of the NRAB and the roster of available referees for each division).

The NRAB is the paradigmatic adjustment board under the RLA. Its bipartisan structure has its roots in the Director General's operation of the railroads during World War I, when disputes were resolved through boards of adjustment composed of equal numbers of management and labor representatives. H. D. Wolf, *The Railroad Labor Board* 47-57 (1927). *See also* P. Harvey Middleton, *Railways and Orga-*

nized Labor 63 (1941). As noted by arbitrator and scholar Dean Lloyd Garrison, the NRAB is "a unique administrative agency" that reflected the customs and traditions of the railroad industry. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567 (1937). Indeed, because the NRAB is composed of representatives of the parties, it is not subject to the rulemaking provisions of the Administrative Procedure Act. *See Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 (6th Cir. 1986) ("The Administrative Procedure Act exempts from its coverage 'agencies composed of representatives of the parties' . . . [and] [t]he NRAB is such an agency . . . .").

The importance of specialized industry and craft experience is reflected in the structure of the NRAB, which is subdivided into four independent divisions with jurisdiction over disputes involving certain crafts and classes of employees. 45 U.S.C. § 153 First (h); John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 91-92 (1981). The First Division has jurisdiction over disputes involving "train- and yard-service employees," such as the grievants below. 45 U.S.C. § 153 First (h) (2006); 29 C.F.R. § 301.4(a) (2008). The Second Division exercises jurisdiction over disputes involving the "shop crafts" (*e.g.*, machinists, boilermakers, sheet metal workers, and electrical workers). 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(b). The Third Division maintains jurisdiction over disputes involving other non-operating crafts, such as dispatchers, maintenance-of-way employees, and signal workers. 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(c). Finally, the Fourth Division has jurisdiction over disputes involving categories of employees not covered by the other three divisions. 45 U.S.C. § 153 First (h); 29 C.F.R. § 301.4(d).

This Court has recognized that the Board members' specialized experience and familiarity with the parties makes the NRAB uniquely qualified to resolve labor disputes in the railroad industry. *See Gunther v. San Diego & Ariz. E. Ry. Co.*, 382 U.S. 257, 261 (1965) ("The Railway Adjustment Board, composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices."); *Slocum v. Delaware, L. & W.R. Co.*, 339 U.S. 239, 243 (1950) ("The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications.").

Although the decisions of the NRAB are not considered to be binding precedent, they are often cited by the Board in subsequent cases on the same or related issues. *See Slocum*, 339 U.S. at 243. These organic lines of authority exist on issues of Board procedure as well. Indeed, in the complex world of labor relations, issues of substance and procedure are often inextricably intertwined. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964) (regarding "procedural disagreements not as separate disputes but as aspects of the dispute which called the grievance procedures into play"). Therefore, individual Board decisions, like the decisions at issue in this case, should not be viewed in isolation, but rather as part of a broader pattern of decision-making. The

Board's decisions in this case have been incorrectly characterized as creating a "new" rule. In fact, the Board applied and built upon longstanding rules and arbitral authority. Pet.App.65a-107a.

The NRAB has served as a model for the various other kinds of adjustment boards that have been authorized by the RLA and utilized by the parties to resolve minor disputes under the RLA. These include the system boards that are prevalent in the airline industry, as well as the "system, group, or regional boards" (so-called SBAs) and "special boards" (so-called public law boards) that are established on an ad hoc basis in the railroad industry. 45 U.S.C. § 153 Second. Like the NRAB, these boards are bipartisan, typically consisting of at least two partisan members (one appointed by each side) and a neutral member to resolve deadlocks. *See The Railway Labor Act* 410-12, 417-18 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005). Unlike the NRAB, however, these system boards, public law boards, and SBAs are creatures of the parties' agreements. *See* John W. Gohmann, *Arbitration and Representation: Applications in Air and Rail Labor Relations* 91, 96 (1981). System boards and SBAs, while authorized by the RLA, are established only by mutual agreement, whereas a public law board may be established upon written request by either party. *Id.* at 91.[4] The jurisdictional and procedural rules applied by these boards are defined by the parties' agreement. *See The Railway Labor Act* at 411-12, 414-15, 418.[5]

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[4] Congress authorized the creation of public law boards in the 1966 amendments to the RLA in an effort to eliminate the backlog of pending grievances at the NRAB. Pub. L. No. 89-456, 80 Stat. 208 (1966); Benjamin Aaron et al., *The Railway Labor Act at Fifty* 229 (1977). They are called "public law boards" because they were authorized by the Public Law that is now codified in §3 Second (second paragraph). *See The Railway*

Given the different source of the jurisdiction and procedures of these various other boards, the concept of constitutional due process cannot be readily applied to them. Furthermore, the exacting standard of due process review applied by the Seventh Circuit in this case – a standard that abhors "new" rules – would be all the more inappropriate if applied to these ad hoc boards, whose procedural and evidentiary rules are the product of the parties' agreements.

II. THE RLA IS IN HARMONY WITH THE GENERAL FEDERAL POLICY FAVORING FINAL AND BINDING ARBITRATION.

The statutory mandate for final and binding arbitration in the airline and railroad industries is in harmony with federal policy under the National Labor Relations Act ("NLRA"), the law that governs labor relations outside the airline and railroad industries. Arbitration's central role in federal labor policy is also in accord with a broader public policy trend that favors final and binding arbitration as a method of resolving many other categories of disputes.

Labor Act 72 (Michael E. Abram et al. eds., ABA Section of Labor and Employment Law, 2d ed. 2005).

[5] Indeed, in the case of public law boards, the Act provides for the appointment of a "procedural neutral" to help the parties resolve disputes over the board's jurisdiction and procedures. *See* 45 U.S.C. § 153 Second; *see generally The Railway Labor Act* at 412-13.

In cases arising under the NLRA, this Court has recognized that arbitration plays a central role in federal labor policy not merely as a substitute for litigation, but as "the substitute for industrial strife." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). This appreciation for arbitration was borne out of the reality that a collective bargaining agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* Consequently, arbitration is needed in order to develop the "common law of the shop which implements and furnishes the context of the agreement." *Id.* at 580. In this sense, arbitration of labor disputes "is part and parcel of the collective bargaining process itself." *Id.* at 578.

Arbitration cannot serve as an effective substitute for industrial strife unless courts afford an extraordinary level of deference to the arbitrators whom the parties designate to develop the "common law of the shop." Resolution of labor disputes requires "knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Rules and decisions that evolve as part of the common law of the shop can be easily misunderstood by outside observers. A new arbitrator, like a new employee, must be "gradually initiated into what amounts to a miniature society" that has "a formal government of its own – the rules which management and the union have laid down" and its own "social classes, folklore, ritual, and traditions." *Id.* at n.2 (quoting Walker, *Life in the Automatic Factory*, 36 Harv. Bus. Rev. 111, 117 (1958)).

Given the peculiar realities of the industrial social order, this Court has acknowledged that there is an almost insurmountable preference for the judgment of labor arbitrators over that of the federal judiciary: "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). This holds true even when the arbitrator commits "serious error" or engages in "improvident, even silly, factfinding." *Id.* at 38-39. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Enter. Wheel & Car*, 363 U.S. at 596.

Although the public policy favoring final and binding arbitration of labor disputes has existed for decades, this Court in recent years has embraced the value of arbitration as an effective and efficient method of resolving disputes arising under a wide range of other federal laws as well, including antidiscrimination laws, securities laws, and antitrust laws. Most recently, in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), this Court traced the gradual erosion of "the old judicial hostility to arbitration." *Id.* at 1470 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989)). In particular, this Court acknowledged that the parties may legitimately trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 1471 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Expanding the bases to challenge an arbitration award in federal court undermines the strong policy preference for resolution of such disputes by an arbitrator who is familiar with the parties, their agreement, and their unwritten practices and customs. It also undermines the tradeoff between the cumbersome procedures of federal court litigation and the relative informality of arbitration. For both reasons, it is essential for the Court to enforce statutory limits on judicial review of arbitration awards.

III. PROCEDURAL AND EVIDENTIARY ISSUES DECIDED BY ADJUSTMENT BOARDS ARE NOT APPROPRIATE SUBJECTS FOR COLLATERAL DUE PROCESS REVIEW.

Due process review of adjustment board awards is inconsistent with the 1966 amendments to the RLA, the legislative history of that statute, this Court's decision in *Sheehan*, and the practical reality that procedural issues are resolved by arbitrators in the context of their consideration of the merits of the case.

A. Congress Rejected Judicial Review on Extra-Statutory Due Process Grounds.

When Congress amended the RLA in 1966, it did not authorize judicial review of adjustment board awards beyond the grounds specifically provided in those amendments. Before the 1966 amendments, the RLA did not provide any explicit bases for judicial review of adjustment board awards, except in the context of an action to *enforce* an award against a noncomplying carrier under Section 3 First (p). *See Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 615-16 (1959). There was no judicial review of awards that denied an employee's claim. The Court in *Price* held that "[t]he disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed." *Id.*[6] This Court acknowledged, however, that some courts of appeals had, under the pre-1966 version of the Act, permitted judicial review on due process grounds. *Id.* at 616.

In 1966, Congress specified three explicit, and narrow, bases for judicial review of adjustment board awards, which now appear in Section 3 First (q) of the Act. During the debate over the 1966 amendments, Congress rejected proposals to add provisions that would have permitted judicial review on independent due process grounds. The report of the House Committee on Interstate and Foreign Commerce considered the constitutionality of limited judicial review of adjustment board awards and concluded that "it is clearly within the power of the Congress to limit the scope of judicial review of orders of such a tribunal without regard to whether such tribunal is constituted by agreement or by governmental action." H.R. Rep. No. 89-1114, at 16 (1965). Further, the House Committee specifically rejected arguments that "judicial review must be available in the case of awards of the Board because the Board's procedures are so sketchy that they, standing alone, do not constitute due process of law." *Id.* at 17. Similarly, the Senate rejected a proposal, made by the railroads, that would have allowed challenges to NRAB awards that were "contrary to constitutional right, power, privilege, or immunity" or that were issued "without observance of procedure required by law." Alvin L. Goldman, *Selecting the Correct Standard for Judicial Review of Airline Grievance Arbitration Decisions*, 9 U. Pa. J. Lab. & Emp. L. 743, 773-74 (2007) (citing *Amend the Railway Labor Act: Hearing on H.R. 706 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 89th Cong. 16-66, 123-44, 303-16 (1966)).

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[6] As the Court noted, the Act did not contain a similar provision for enforcement of an award against employees because "if the grievance is not sustained by the Board, the award simply denies the claim and requires no affirmative action by the employee." *Price*, 360 U.S. at 613 n.10.

The Court's subsequent decision in *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), is consistent with the 1966 amendments and their legislative history. In *Sheehan*, the Court reviewed a Tenth Circuit decision that remanded an award on due process grounds because the board failed to consider the employee's argument for tolling the time limits set forth in the collective bargaining agreement. The Tenth Circuit held that the board's failure to consider this equitable tolling argument "deprived Sheehan of an opportunity to be heard in violation of his right to due process." *Id.* at 91-92 (quoting 576 F.2d at 857). This Court ruled that either the Tenth Circuit was mistaken as to the board's consideration of Sheehan's equitable tolling argument, or the Tenth Circuit "exceeded the scope of its jurisdiction to review decisions of the Adjustment Board." *Id.* at 92-93. In either case, this Court held that Sheehan's objections to the board's award did not fall within "any of the three limited categories of review" provided in Section 3 First (q). *Id.* at 93.

Thus, Section 3 First (q) must be read as foreclosing judicial review on due process grounds that are not otherwise subsumed within those three limited grounds and the specific procedural safeguards provided elsewhere in Section 3. *See, e.g.*, 45 U.S.C. § 153 First (i), (j); *Kinross v. Utah Ry. Co.*, 362 F.3d 658, 663 n.3 (10th Cir. 2004) ("We believe the Railway Labor Act itself provides for process sufficient to meet constitutional requirements."). This meaning is evident from the plain terms of the statute as well as its legislative history.

B. Procedural Issues, Even Those Affecting Arbitrability, Are Within the Particular Expertise of the Arbitrators.

Due process review as applied by the lower court is also inconsistent with the fundamental rule, expressed by this Court, that procedural issues must be left to the arbitration board. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002). As this Court held in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), procedural issues must be treated as part and parcel of the substantive dispute:

> Questions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it.

Id. at 556-57. In some cases, the award is so brief that it is difficult to discern whether the board decided the case on procedural or substantive grounds. *See, e.g., Bhd. of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 34 (1963); *Price*, 360 U.S. at 606-07. Indeed, there may be good labor relations reasons for issuing a terse award, without explicitly dealing with every argument raised by the parties – whether procedural or substantive. But if the board, in its wisdom, decides to rest its decision on procedural grounds, that award is entitled to no less deference than if it were based solely on the substantive merits of the dispute.

The due process review undertaken by the lower court conflicts with this important policy because it subjects the procedural aspects of the award to stricter scrutiny than the arbitrator's decision on the merits. In effect, therefore, the award may be treated as less final and less binding when the board, in its discretion, determines to base its decision on procedural grounds rather than on the substantive merits. This result is inconsistent with the judgment, articulated in *Wiley*, that labor disputes involving both procedural and substantive issues should be decided exclusively by the arbitrator. *See id.* at 557 ("It would be a curious rule which required that intertwined issues of 'substance' and 'procedure' growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result."). It is also inconsistent with well-established precedent under the RLA, which holds that an adjustment board's rulings on procedural and evidentiary issues are not subject to judicial review. *See, e.g., Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 841 (7th Cir. 1999) (claims that a board weighed the evidence improperly exceeded the scope of judicial review); *Anderson v. Nat'l R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) (the "sufficiency of the evidence comprising the foundation of the Board's decision is not reviewable"); *Kotakis v. Elgin, Joliet & E. Ry.*, 520 F.2d 570, 576 (7th Cir.) ("Congress did not intend for the courts to maintain a check on each procedural and substantive ruling of the Board."), *cert. denied*, 423 U.S. 1016 (1975).

In the end, permitting an arbitration award to be challenged on independent due process grounds would, in almost all cases, serve only to delay final resolution of the underlying dispute.[7] Sanctioning yet another basis for review of arbitration awards under the RLA – particularly the sort of intensive scrutiny of procedural and evidentiary issues that the Seventh Circuit engaged in here – would invite many more longshot attempts to change the outcome of the award.

IV. THE NRAB'S DECISION IN THIS PROCEEDING WAS A RUN-OF-THE-MILL PROCEDURAL RULING THAT DOES NOT OFFEND PRINCIPLES OF DUE PROCESS.

The corollary to *Wiley* is that due process review cannot be undertaken apart from the context in which the underlying decision was made. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). *See also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). The NRAB presents a compelling illustration of this principle. Its bipartisan design and its place in the complex mechanics of railroad labor-management relations must be considered when evaluating any claim that a particular award violated due process.

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[7] A recent study of 158 petitions to vacate commercial arbitration awards on the ground that the arbitrator exceeded his/her authority found that the award was vacated in only 12 of those cases, and 2 of those 12 cases were reversed on appeal. *See* Thomas J. Brewer & Lawrence R. Mills, *When Arbitrators "Exceed Their Powers,"* Disp. Resol. J., Feb./Apr. 2009, at 48. Thus, the party seeking to vacate the award was ultimately successful in only 6.3% of these cases (10 out of 158 cases). In the other 93.7% of cases, the petition succeeded only in prolonging final resolution of the dispute.

A claim that the NRAB violated due process by refusing to consider certain evidence, as in this case, must be judged in light of the appellate nature of proceedings before the Board. It is well-understood that the Board, as an appellate body, decides cases solely on the basis of document submissions, although either party may request an oral hearing. 29 C.F.R. § 301.7(a). In discipline cases, such as the claims now before the Court, the Board receives a copy of the "Investigation Transcript," including any exhibits entered into that record, as well as the parties' correspondence during the on-property appeals process. 29 C.F.R. § 301.5; National Railroad Adjustment Board, *Uniform Rules of Procedure* 1.(d) (Revised June 23, 2003). The parties have long understood that new evidence may not be added to the original submissions. Therefore, in evaluating a claim that the Board should have considered additional evidence, it must be recognized that consideration of such additional evidence would be inconsistent with the parties' normal practice.

As the supplemental appendix submitted by the Petitioner in the court of appeals reflects, the NRAB considers a wide variety of procedural issues, including evidentiary questions that may determine whether a matter is properly before the Board. The multiple factual situations in which these issues are presented to the NRAB become grist for the Board's decision-making processes. The facts are debated by partisan members who typically have had years of experience in such matters.[8] The Division members hearing the case call upon their own experience as well as on the decisions and practices in other Divisions of the NRAB. In some cases, the union members persuade the referee and in others the carrier members prevail. Some of these procedural disputes relate to the conduct of a conference between the parties to resolve the dispute and to the introduction of new evidence at the board-stage of the proceeding. As early as 1937, Dean Garrison reported on his experience as an NRAB referee on the First Division addressing disputes over the introduction of new facts not contained in the original submissions. Lloyd K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 578-79 (1937) ("The rules of the Board provide that the parties are 'charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.'").

The NRAB continually deals with the potentially dispositive issue of what evidence the Board may properly consider. In Awards 26089-94, now before the Court, the referee relied upon past awards for the decision to reject new evidence, including his own prior First Division decision in Award 24020. Pet.App.65a-107a; Supp.App.82 (7th Cir.). These very same parties took opposite positions on the issue of new evidence just a year before the awards at issue. In that proceeding, the Respondent successfully argued that the grievance should be sustained because the carrier could not give the Board the date of an Investigation Transcript; the date had not been part of the record submitted to the NRAB. Supp.App.63-66 (7th Cir.). Accordingly, the Board overturned the discipline based on that seemingly technical omission. Similarly, with respect to the jurisdictional requirement that a conference between the carrier and the union take place before the grievance is progressed to the NRAB, the arbitrator in this case relied on several awards in the First Division and other Divisions to support his conclusion. Pet.App.65a-107a. There is no dearth of authority on the procedural issues before the NRAB; at least nineteen previous NRAB cases have addressed similar issues. Supp.App. 63-134 (7th Cir.).

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[8] For instance, the Respondent's representative on the NRAB Division that heard this case had served as a member of the Board since 1982.

Thus, "due process" before the NRAB involves a unique common law that has developed and evolved over nearly seventy-five years. This case is an apt example of how the NRAB process deals incrementally with its appellate character, its evidentiary rules, and the predicate stages of the grievance process. It would accomplish little to superimpose new and uncertain standards for proceedings by permitting due process to be a basis for reviewing the decisions of the NRAB and possibly also the many other adjustment boards that interpret and apply the thousands of negotiated agreements in the railroad and airline industries.

CONCLUSION

For all the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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